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In the Supreme Court of the United States,

OCTOBER TERM, 1910.

No. 398.

STANDARD OIL COMPANY ET AL.,
Appellants,

vs.

THE UNITED STATES.

Present on behalf of the appellants, JOHN G. JOHNSON, ESQ., JOHN G. MILBURN, ESQ., D. T. WATSON, ESQ., M. F. ELLIOTT, ESQ., FRANK L. CRAWFORD, ESQ., and MARTIN CAREY, ESQ.

Argument of JOHN G. MILBURN, on behalf of the appellants.

MR. MILBURN: May it please the Court, this is a proceeding instituted by the Government in the Eastern Division of the Eastern District of Missouri against the Standard Oil Company of New Jersey and seventy-eight other defendants. There was only one defendant, the Waters-Pierce Oil Company, which resided in that district, and could be served with process there. The Standard Oil Company of New Jersey owned some three-fourths of the capital stock, and it was a marketing company, operating in the Southwest and other States. Contemporaneously with the filing of the petition an order was made by the Court, under Section 5 of the Act permitting the service of process upon all of the other defe dants —the other seventy-eight defendants—outside of the district;

that section providing that in a pending proceeding the court may in the interests of justice bring in other defendants by the service of process upon them outside of the district. Motions were made on affidavits showing the residence of the parties to set aside that order as without jurisdiction or warrant of law, which were overruled; and then special pleas to the jurisdiction raising the same question, were filed, which were overruled. Process was served on all the other defendants under that order. I mention those facts simply to show that that question is before this Court in this case.

The bill is founded upon an alleged conspiracy originating in the seventies, first of Mr. John D. Rockefeller, Mr. William Rockefeller and Mr. Flagler, and later joined by Mr. Oliver Payne, Mr. Charles Pratt, Mr. Rogers and Mr. Archbold, to control and monopolize the trade in petroleum and the products of petroleum. The operations of this conspiracy are divided by the bill into three periods, the first extending from 1870 to 1882, during which it is alleged that these individual defendants, associating others with them, through agreements with other refiners, through acquiring stock interests in other refining companies, and through acquiring control of pipe-lines, monopolized ninety per cent. of the oil business, or gathered the means of monopolizing that amount of the business.

The next period is from 1882 to 1899, beginning with the so-called Standard Oil trust, whereby all of these stocks and properties were transferred to nine trustees, with power to vote the stock, and with the widest powers of management, certificates being issued to the beneficial owners of the stocks and properties. In that period it is alleged that as a result of a decision of the Supreme Court of Ohio the trust was dissolved pursuant to provisions enabling it to be dissolved contained in the original trust agreement; and it is said that it was dissolved in such a manner that the control was preserved and continued down to 1899. That is the second period.

The third period is from 1899 down to the time the bill was filed, the central fact of that period being that in 1899 the Standard Oil Company of New Jersey was enlarged, its stock was increased, and it acquired all the stocks of the subsidiary companies, and has held them ever since, and has been

the owning, managing, directing corporation of all of the corporations of which this organization consists.

Then the bill goes on, having through those allegations sought to establish that a combination in restraint of trade was the result, to allege various illegal means pursued through these years to effect a monopolization of the oil business, the control of pipe-lines, restrictive agreements, railroad rebates and discriminations, unfair competition—all of which are set out at great length—with the result, as the bill charges, that from ninety to ninety-five per cent. of this business from 1882 down to the time of the filing of the bill was acquired, an incident of which was the control of prices, and very large profits.

Now, that is the case that is made by the bill. I will only add that, according to its allegations, in 1882, when the Standard Oil trust was formed, what were assembled were a mass of independent, competing companies, and that it was those companies—and others that had been added—that in 1899 were subjected to the control of the Standard Oil Company of New Jersey. Answers were filed, and an enormous mass of testimony was taken; but the great organic facts, counsel should be able to state so that the Court can comprehend them without any particular reference to the record, because they are not in dispute; and if I and my opponents do not fall into extravagance of statement or figurative language, we should be able to make them clear to the Court.

The opinion in the Court below proceeded in this way—just to state very briefly its conclusions. It found that the transfer of the stocks in 1899 to the Standard Oil Company of New Jersey was a combination in restraint of trade under Section 1 of the Sherman Act. That is the first proposition of the opinion. The Court recognized that all of these corporations were owned by the same individuals, in precisely the same proportions, and had been, as to those that existed in 1879, since that time, and as to those that had been created after that time since their creation, in the same common ownership. But the Court said that although the same men owned all these corporations in the same proportions, there were three thousand of them, and the transfer of their stocks to the Standard Oil Company of New Jersey created a more durable and efficient administration of those joint properties,

and tended to prevent their disintegration into separate ownerships through the sale by individuals of the stock of some of the corporation and not of the stocks of others; that out of that disintegration there might possibly come competition; and therefore there was restraint of trade. Then the Court said that that illegal combination under Section 1 was an illegal means of monopolizing under Section 2 of the Act, and therefore it found it unnecessary to pass upon all these extra, additional means of monopolizing which were alleged in the bill. We are here without any findings whatsoever on those matters.

Then comes the decree, which was that the transaction of 1899, the transfer to the Standard Oil Company of New Jersey, was an illegal combination under Section 1, and that all these companies specifically named were in that illegal combination; and all the subsidiary companies are restrained from paying any dividends to the Standard Oil Company of New Jersey, and the Standard Oil Company of New Jersey is restrained from exercising any control over them, except to distribute their stocks *pro rata* amongst its stockholders. Then the decree goes on and in a very radical and elaborate subdivision prescribes what these companies, when the stocks have been distributed, shall not do in relation to each other, in regard to transfers of property and various other matters—a special code, as it were, for the future government of the individual stockholders who shall own these stocks after the distribution is made. Then it says that the corporation or the combination may not, unless the combination be dissolved, engage in interstate commerce. The decree further provides that its operation shall be suspended, if an appeal be taken, until thirty days after its affirmance by this Court, if it be affirmed, thus allowing us thirty days for the disintegration of this institution.

MR. JUSTICE DAY: What is the condition precedent to engaging in interstate commerce?

MR. MILBURN: That we shall dissolve the combination.

MR. JUSTICE DAY: That is, when the stock is distributed.

MR. MILBURN: The distribution will be a dissolution. The decree is without prejudice to the distribution of the stocks of all of the corporations among the individual stockholders.

MR. JUSTICE DAY: The effect of the decree is, that that being done, the inhibition as to engaging in interstate commerce is withdrawn?

MR. MILBURN: Yes. The inhibition is only if the combination is continued.

MR. JUSTICE MCKENNA: In other words, the status applying before the formation of the last Standard Oil Company would be restored?

MR. MILBURN: Would be restored.

Now I come (having stated these matters so that the Court might have before it what was claimed, what was decided, and what is decreed) to an effort to make clear to you what the history of this institution has been. The use of petroleum through processes of refining, began in the period between 1860 and 1870. The location of the original field was in a portion of Pennsylvania. As it was developed a vast mass of refineries sprang up, and congeries of little pipeline systems were built, to reach from the wells to some railroad point or other—the Pennsylvania, the Erie, through its connection with the Atlantic and Great Western, and the New York Central with the Lake Shore, early extending lines towards the fields. It was in every way a scene of the greatest excitement and of the greatest speculation. One result was an immense over-production of refining capacity. The whole of that part of Pennsylvania was dotted over with makeshift refineries. Some of the men who engaged in the business succeeded in establishing more durable plants. Many men had not the means to do that and went out of business. No condition could be more accurately described as chaotic than the conditions which existed in every branch of the industry during those years in the oil regions.

There was one very young man who in the early sixties, with a small amount of money that he had saved, went into this business at Cleveland, who possessed the gifts and qualities of genius—because business has its genius just as finance or war or government or literature or art has its genius. That man was John D. Rockefeller. Realizing the conditions which existed, the uncertainties of the raw material, and all the features of instability that were present, he grasped certain fundamental facts. One was that with this great over-production of refining capacity the profits of refining were falling

and falling, and that the cure for that condition was volume of business. Another was, that you must distribute your refining capacity to meet the demands of different localities; I mean by that, a geographical distribution of refineries. Another was that pipe lines were the arterial system of a refinery, supplying its daily needs; that refining could not be carried on in a large way without its own pipe-lines; and that success in the business depended upon its economical conduct; I mean, economy in methods not only in connection with the refining, but in connection with the sale and distribution of the manufactured product.

I do not say that these ideas burst from his brain in an instant, but he was quick to see what was inevitable, and I have no doubt made up his mind that to the extent that means could be obtained therefor, those must be the lines that any business must proceed on if it was going to live, and if it was going to be successful.

He became in 1864, or 1865, associated with Mr. Andrews, who was a practical refiner, and they built a refinery. I say Mr. Andrews was a practical refiner. He was a practical mechanic—a very able man. Those were the two men who originally established the refinery in Cleveland, Ohio. In the next year Mr. Rockefeller associated with them his brother William and formed the firm of William Rockefeller and Company—the other firm being Rockefeller and Andrews—and they built another refinery at Cleveland. Then, to realize one of the ideas which I outlined, they established a warehouse in New York for the export trade, with lightering facilities, and a sales department to handle their own business, and save all the expenses of this character that refiners generally had to pay to others.

The next year Mr. Flagler joined them in the co-partnership, bringing in more capital; and then it became Rockefeller, Andrews and Flagler; and that firm took over the properties of Rockefeller and Andrews and William Rockefeller & Company, so that they had the two Refineries in Cleveland, and the facilities in New York for exporting and marketing their products.

MR. JUSTICE MCKENNA: Excuse me just one minute. Did the Rockefellers establish two refineries?

MR. MILBURN: They had two refineries on adjoining prop-

erty. That continued until 1870, and during that time those men had impressed themselves upon their community by the things that they had done. Take the matter of barrels alone, for instance, which refiners bought, made as they were out of green wood, and costing $2.50. They bought timber lands; built their own barrel factory, and made their barrels out of seasoned timber, so that there would be the least amount of leakage, besides saving a large amount on the cost of each barrel. That is an illustration of how they conducted their business, and then they had the necessary credit to carry on and extend their operations because of the impression they had made upon their community.

In 1870 those men had succeeded in so extending and developing their business that they did about one-tenth of the whole petroleum business. In that year the Standard Oil Company of Ohio was organized, into which some new men came, with a capitalization of $1,000,000, and the properties of these concerns were transferred to the Company. That is the origin of the first Standard Oil Company—the Standard Oil Company of Ohio, which began its operations at that time, and is continuing them to-day.

In 1871 there was a lot of refineries in Cleveland which had grown up as I have described, and it was perfectly realized at that time that the conditions of the business had so changed that unless a man had capital to keep advancing, to keep increasing, to keep applying every discovery of the art, at no matter what expense, that unless he could reach out and establish his own marketing facilities, he must go by the board. The Standard Oil Company in 1871 and 1872 bought I should say fifteen or sixteen of these refineries in the City of Cleveland. The owners were all Cleveland men and Cleveland was a small city at that time. I know from experience what those cities were in those times, as compared with what they are now, because it was about that time that I went to one of them myself. These men were all well and intimately known to each other; and the conditions of the business were perfectly realized by all of them. As Mr. Rockefeller described them, they were all friends and neighbors. Those refineries were bought and were conveyed to the Standard Oil Company of Ohio, and they were paid for, at the election of their owners, either in stock of the Company or in cash. So little

confidence was there in the business at that time that many who took stock sold it to get the cash, which was surer. These refineries were connected by pipe lines, were from time to time consolidated, and, in one way and another, all utilized in such ways as would be natural to secure the most economical use of them.

Now, from that time on to 1879 or 1880, a period of about ten years, a great many transactions took place resulting in the acquisition of refining properties. During those years the oil-producing territory was confined to Pennsylvania—a part of Pennsylvania. The oil-refining centers were the oil regions—Titusville, Franklin, and various other places; Pittsburg and Cleveland; and on the Atlantic Coast, New York harbor, Baltimore, Philadelphia, and in a very minor degree, Boston. Through a succession of separate, distinct and independent transactions, refineries were bought at all of those points beginning first with New York harbor; and amongst them there were some large purchases. In 1874 Charles Pratt and Company owned one or two refineries and had an important trade, the principal refinery being the Pratt Works, to-day in operation. The refineries of that Company were acquired. I will tell a little later how these acquisitions were paid for. I confine myself just now to what they were. It was in connection with that purchase that Mr. Charles Pratt and Mr. H. H. Rogers became identified with the Standard Oil interests.

There was a refining interest which had grown up in Pittsburg and Philadelphia, made up of men whose names were Warden, Frew and Lockhart. They had one firm name in Pittsburg and another firm name in Philadelphia, and they owned in Philadelphia a refinery called the Atlantic Refinery, and in Pittsburg some four or five or six refineries. Those properties were purchased in 1874. These were the chief purchases. In 1875 refineries at Titusville and other points in the oil regions were acquired for the advantages of refining there.

There was always intense feeling on the part of the Pennsylvania Railroad that the oil traffic belonged to it. Its line was at Pittsburg and the oil fields were near to Pittsburg. Its railroad was the direct railroad communication with the seaboard at Philadelphia and other points. The New York Central and Erie with their western connecting lines were

longer and more circuitous routes. Mr. Scott's position was that they were intruders in that territory, and there was bitter and relentless war between these railroads with short intervals of peace. Mr. Scott was an aggressive personality. He had a corporation created, known as the Empire Transportation Company, which built pipe-lines into the oil fields, and which built refineries and went into the refining business in Philadelphia and Pittsburg, and was beginning to do the same thing beginning on the Jersey shore. Then in 1877 arose the greatest war of all. The Erie and the New York Central said: "With your pipe-lines bringing the crude to you, and your refineries, you are getting all the business, and we object to it." The Standard Oil Company took the position: "You should not be refining oil as against us, and we will withdraw all of our traffic from your road." The Erie and the Central stood with the Standard in that position, for their own oil trade, and the result of that fight, and the demoralization it involved, was that the Pennsylvania Railroad, or rather its auxiliary company, sold its refineries and pipe lines to the Standard, although Mr. Cassatt's testimony, which was read into the record, says that he insisted that they should take the pipe-lines against their wishes. That was a large purchase, and that was how it came about.

Refineries were acquired at Baltimore in 1877, and there was a slight production in West Virginia, and a refinery at Parkersburg—whether one or more I have forgotten—was acquired. The object was, as they had the means, to establish themselves at all the principal refining points, including in the oil regions themselves such places as Franklin and Titusville. It was in 1877 that they made up their minds to extend their operations to lubricating oil. Lubricating oil is made from the residuum after the refined oil is taken off. The lighter products become the illuminating oils, also called refined oil. Out of the residuum the heavier lubricating oils are made; and they began that development of their business in 1877 by acquiring interests in lubricating plants—four or five or six of them, amongst others the Galena Oil Company, at Franklin, Pennsylvania.

MR. JUSTICE HOLMES: When was the war over with the Pennsylvania Railroad? When did they finish their fight with the Pennsylvania?

MR. MILBURN: In 1877. I wish now to refer to the pipe-lines—the development that there had been to take the oil as it came from the wells Your Honors no doubt know that oil, when it is found, is pursued with relentless energy, because it is a subterranean lake, and whoever gets there first begins to drain the lake. Thereupon everybody who has any property in the vicinity sinks wells to get his share of the lake and when the lake is dry, that is the end of that particular region.

Pipe-lines, with high-sounding names, had been run in there largely for temporary purposes, and in the early seventies there were a few hundred miles of them.

THE CHIEF JUSTICE: Between these wells and the refineries?

MR. MILBURN: Between the wells and railroad points. There would be the little gathering lines, and then a pipe running to a railroad point. First they carted it to the railroad, as the railroads were built into the oil region; then they ran a pipe to the railroad. The gathering pipes converged in a pipe which conveyed the oil to some railroad point, and then the railroad transported it to its destination. The production of crude oil in 1870, was 5,000,000 barrels.

THE CHIEF JUSTICE: In 1870?

MR. MILBURN: In 1870; and it began increasing rapidly from that time on—not a phenomenal increase at first, but 6,000,000 the next year, and 7,000,000 barrels the next year, and so on. There was need of rapid pipe-line construction. If the oil is not saved when it comes out of the ground it is lost; and it was in 1874 that these interests first bought a little line.

THE CHIEF JUSTICE: In 1874 they did what? You dropped your voice, and I did not catch it.

MR. MILBURN: In 1874 they bought a small line, just a few miles, called the American Transfer Company. There was a more considerable concern, called the United Pipe Lines. That was a descriptive title. Right then, or shortly after, they bought a third interest in that concern. These purchases were due to the necessity of pipe-lines to assure a steady supply of crude oil for refining purposes.

Between that time and 1877 various of the other small systems were bought by this United Pipe Lines concern from time to time. These systems were merely gathering lines in

the oil fields, with shorter lines running to the railroad points, right in the oil fields. There were only a few hundred miles of them altogether, including those that the Pennsylvania Railroad Company had constructed and sold to the Standard. That was the origin of the pipe-line ownership.

In addition other interests of a marketing character had been acquired. For instance, there was a concern, a small concern in those early days at Louisville, Kentucky, known as Chess, Carley & Company. It had a little bit of a refinery and a marketing business in the southwest. Wishing to extend the sale of their oil in the south west they joined with Chess, Carley & Company, and bought an interest in that business, and furnished capital to expand and develop it. Capital was the great necessity of that time. The production of crude oil was increasing, and with it the production of refined oil was also increasing, and markets had to be developed. Other similar purchases during these years were those of an interest in the marketing business of Alexander McDonald & Co. at Cincinnati and in the marketing business of the Waters-Pierce Company at St. Louis. This is the history of the acquisitions during the seventies.

Now, how was this done? Who did it? For whom was it done? Who became the owner of all of these refineries and pipe-lines and other properties as they were bought? How were they paid for?

Let me answer those questions. The Standard Oil Company of Ohio was limited in its corporate powers as to owning stocks in other corporations. As to some of these properties, the stocks of the corporations which owned them were acquired, or parts of their stocks were acquired; and as to others, sometimes the physical property was transferred, and where the physical property was transferred it would be transferred to the Standard Oil Company of Ohio or to some individual in trust. Those properties were all acquired for the stockholders of the Standard Oil Company of Ohio—the individuals who were the stockholders at any given time. They were the purchasers. They became the owners. The capital stock of the Standard Oil Company had been increased from one million to two millions and a half, in connection with the acquisition of the Cleveland refineries. In connection with the purchase of Charles Pratt & Company, and the Warden-Frew interests

in Philadelphia and Pittsburg, it was increased a million dollars more at that time. So that in 1874 its capital stock became three million and a half dollars, and its capital stock remains at that figure to-day.

MR. JUSTICE MCKENNA: Was that increase supposed to be based on the estimated value of the properties acquired?

MR. MILBURN: No. I said "no," right out, but I would be inclined to say, on reflection, that it was. It was estimated that what those two plants could be acquired for would be about that million dollars; because as I remember (I did not remember it just at the moment) the evidence fairly shows that that increase went for the acquisition of those properties.* As other purchases were made they were either paid for directly in cash, which was furnished from the treasury of the Standard Oil Company of Ohio, out of its undivided profits, its surplus, instead of being distributed to its stockholders; the shares of stock acquired being taken over by individuals in trust, or a new corporation was organized and its stock subscribed for and paid in cash. When a new corporation was organized, the property was conveyed to the stockholders of it, and the cash in its treasury paid for its stock, was paid to the vendors. Let me give you an illustration. In that case Charles Pratt & Company transferred all of the stock of that company to a trustee, to an individual, representing the stockholders of the Standard Oil Company of Ohio. It was paid for with stock of the Standard Oil Company of Ohio. Take the Sone & Fleming Refinery, which is one of the refineries of the Standard Oil Company to-day, and which was acquired from the Pennsylvania Railroad's ancillary company. It was paid for in cash and its stock was transferred to individuals to hold in trust. Take the situation at Parkersburg, West Virginia. In that case a corporation was organized. Its capital stock was the purchase price of the properties, or more. It was subscribed for by Standard interests, and then those properties were conveyed to the new corporation, the Camden Consolidated Company, and paid for out of the subscriptions to its stock. Those were the methods in which the properties were paid for. The stocks that were acquired were taken in

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* NOTE: This is a slight error. Mr. Rockefeller testified that these properties acquired in 1874 were worth $3,000,000 (Vol. 16, p. 3082).

the names of various individuals to hold temporarily until something was arranged as to how these properties were to be held for this common ownership; and they were all transferred on the books of the companies at the time of the transactions, so that any reference to the books of the companies would show who were the owners of the stock—these individuals who were holding it as trustees. That was the situation in 1879.

You can see, your Honors, what a mixed condition it was at that time. There was the Standard Oil Company of Ohio, with its stockholders, and there was a mass of properties which had been acquired, represented mainly by stocks, the whole or portions of the stocks of various corporations. Those stocks were held by various individuals as trustees for the stockholders of the Standard Oil Company of Ohio.

We come now to a transaction in 1879 which is of consequence as showing, with the precision of documentary evidence, what the exact status was at that time, so that it does not depend upon oral testimony or on theories or on constructions of transactions, or anything else. In 1879 all these parties who held these various stocks came together. The certificates were in the possession of the Standard Oil Company of Ohio.

MR. JUSTICE HOLMES: You mean the trustees?

MR. MILBURN: The trustees, the men who held as trustees. They came together, and they executed an instrument whereby they transferred to Vilas, Keith and Chester, three trustees, all of the properties that had been acquired, and all of the stocks which are enumerated in the instrument itself, which they were to hold for the benefit of the individuals mentioned in the instrument, in the proportions stated, which was the proportions of the stock of the Standard Oil Company of Ohio which they owned. For instance, take William Rockefeller. Sixteen hundred thirty-five-thousandths was his interest as beneficiary in the trust property. There were 35,000 shares of the Standard Oil Company of Ohio, and he owned 1600. That was his proportion of all of this property which had been acquired. John D. Rockefeller owned 8984 shares out of the 35,000. That was his proportion. The same is true of any then stockholder of the Standard Oil Company of Ohio. This property was conveyed to these trustees "to have and to hold said stocks

and interests to them and their survivors and successors, in trust, nevertheless, for the following purposes, to wit: To hold, control and manage the said stocks and interests for the exclusive use and benefit of the following named persons and in the following proportions named:"—then there is enumerated all of the individuals who were all of the stockholders of the Standard Oil Company of Ohio, and the proportion of their stock ownership—"and to divide and distribute the same as soon as they can conveniently do so between the said persons for whose benefit they hold the same as aforesaid, and in the respective proportions aforesaid."

It is plain that this was no mock instrument. It was a very important instrument, and it was executed by all these parties. The ultimate disposition of these properties had not been determined. So far as they had reached any conclusion at that time—this body of owners—it was to distribute amongst the individuals who owned the properties, each in his proportion, the stocks which constituted the trust estate. That evidently was their idea at that time, until, no doubt, the impracticability of such a step was realized, and the desirability of continuing the common property in a common ownership was fully realized. Then came the trust agreement of 1882.

It is unquestionably true, in some instances where stocks of corporations were acquired and paid for with stock of the Standard Oil Company of Ohio, that individuals who received such stock continued to hold it. A great many did not. They sold their stock. Nobody was compelled to hold his stock. He took his stock in payment for his interest in his corporation, and he could sell it or not sell it as he saw fit. If he sold it, his interest was gone. If he kept it, he remained a stockholder of the Standard Oil Company of Ohio as long as he saw fit to hold it. There was no requirement that he should hold it. There was no prohibition upon him of any kind whatsoever. He was perfectly free; and not a vendor of any of these properties was restricted in any way whatsoever with reference to going into the oil business—not one. They could go into the business again if they saw fit. Not one was produced as a witness to complain that any of these purchases was forced or coerced. There was nothing of that kind, and no man was placed under a ban of any kind, either as to his stock or as to the engage-

ment of himself and his capital and his energies in the business in the future.

That was the situation in 1879. I want to bring home to the Court the realization, because I feel that it is a pivotal fact, that those properties at this time had been acquired for a body of common owners, and were owned by a body of common owners, and so the Court below found; and that body of common owners, not always composed of the same individuals, but all the same a body of common owners—one might sell out and another man take his place—has continued to own them and all of the properties of the Standard Oil Company from that day to this. You can see from that trust instrument of 1879, and from the acquisition of these properties from time to time over a period of eight or nine years, that there had been very little integration in 1879. They quote testimony given on investigations at that time, and say that it was not a frank revelation of the common ownership. I do not think it is necessary to take up time with that. At best, it is merely a criticism of individuals. It does not throw any light on the facts in this case. At that time, nobody knew but what, if those stocks were distributed, the corporations would be owned by all sorts of individuals. Though the process of integration had not proceeded far, it is a misconstruction to say that these properties that were acquired were not owned by a common body of owners. There is the evidence of the fact, and it is a document, the original of which, after a great search, we succeeded in finding and producing.

After 1879 and prior to 1882 there were some further acquisitions, but not at all extensive; and in 1882 the trust agreement of that year was entered into, and then Vilas, Keith and Chester turned over all of this property to the trustees mentioned in the trust agreement, and the beneficiaries joined in the instrument of transfer—who were this body of stockholders of the Standard Oil Company of Ohio. They joined in that transfer, and at that time, in 1882, that particular trust, which is known as the Standard Oil trust, was established. I should mention that there had been organized a company, or rather the charter of the National Transit Company had been acquired, in 1881, in which whatever pipe-line interests that had been acquired, and whatever

pipe lines had been constructed after 1873 or 1874, were vested.

Let us stop at 1882 for a moment. Let me ask the Court to realize the condition of this trade at that time, and what the oil business then was, by figures which I think I can give approximately.

The total production in 1870 was 5,000,000 barrels, and it had risen at the end of 1881, or in the year 1881, to, in round figures, 25,000,000 barrels.

MR. JUSTICE MCKENNA: Twenty-five million or thirty-five million?

MR. MILBURN: Twenty-five million. The Standard's consumption was something over sixteen million barrels, out of this total of twenty-five million. Its refining plants were situated then at Cleveland, in the Oil Regions, Pittsburg, Parkersburg, West Virginia, Philadelphia, Baltimore and New York Harbor. The value of the refining plants was $17,000,000. It had about 3,500 miles of pipe lines, gathering lines and trunk lines, every mile of which had been constructed by itself, excepting about 700 miles of gathering lines.

THE CHIEF JUSTICE: Will you repeat those figures, if you please?

MR. MILBURN: They had in 1882, in round figures, 3,500 miles of pipe lines in Pennsylvania, part of Western New York, and to some extent in West Virginia. Of those about 1,000 or a little over 1,000 were trunk lines, which I will speak of in a moment. About 2,000 odd were gathering lines. Those they had built themselves—the whole thing, in its entirety—with the exception of about 700 miles of the gathering lines that there were in Pennsylvania in the seventies, which had been acquired from the Pennsylvania Railroad and from other little pipe line concerns. They had built all of the trunk lines —unless we call a line running from the oil regions to Pittsburg (the Columbia) forty-two to forty-eight miles in length, which had been purchased, a trunk line. If that is called a trunk line, then all of the trunk lines excepting the Columbia had been built by Standard interests. Now, why that construction? It was because of the enormous increase in the later years of the seventies, and 1880 and 1881,

of the production of crude oil. I have heard many criticisms of the Standard Oil Company in my time, and I have read them in this record, which embodies all that has been said against the Standard Oil Company in the forty years of its life. Any one who desired to come and testify against it did so. But there is one fact that stands out, and they all say that they want to make it an exception. Its bitterest enemy, Mr. Emery, who has been its bitter enemy from the very earliest time, says the great service they then rendered has to be admitted, and that was that when the oil poured out of the ground after 1875 and 1876, beyond any possibility of its use, they borrowed money and found all the capital that they could, and built pipe-lines to reach it and tanks to store it, until they had 30,000,000 barrels of oil in store that had been saved from destruction. That is one of the historical facts of the oil regions, and that is how this rapid increase of pipe-line mileage came about. And, mind you, a storage tank, is filled and sealed, and is never opened until it is used ; and they never use it as long as there is production to use. It is an indefinite time when a tank will be emptied. No other interest could have done that work. It cost millions of money, and they stood there, as they have always stood, ready to buy every gallon of oil tendered to them, so that every producer could sell his product and get his money if he wanted to do so. If not, he could store it on conditions which I will describe later.

At that time, the structure was created practically as it is to-day, with the exception of the additions that it has created itself since. I have shown you what the volume of business was at that time, what the production of crude oil was, and what proportion it used; and I should say, if round figures may be given, that at that time it had, of the domestic refined oil business, somewhere in the vicinity of ninety per cent.

THE CHIEF JUSTICE: You may suspend.

(The Court thereupon took a recess until 2:30 o'clock, p. m.)

AFTER RECESS.

Opening Argument of John G. Milburn, Esq.
(Continued.)

MR. MILBURN: If your Honors please: It is charged and strenuously insisted that these properties were acquired during the '70's, or their acquisition was facilitated, through the railroad situation of that time, and the ability of the Standard Oil people to get better rates than anybody else in the oil business. And certain particular contracts are referred to as evidence of that state of things.

I can only briefly refer to those contracts, but I feel that I should touch upon them in passing.

I may say that there is not a particle of evidence that any of the purchases made during this period resulted from any incidence of railroad rates. No one testified that he was forced to sell or did sell because he could not stay in the business as a result of the railroad rates that the Standard obtained. We know, from the nature of the acquisitions and purchases, that that is not true as to the great bulk of them. Charles Pratt & Company and Warden, Frew and Lockhart did not sell their plants at New York, Philadelphia and Pittsburg, and the acquisitions from the Pennsylvania Railroad in 1877 were not made, as the result of any necessity produced by the railroads or railroad rates. And the only man who refers to the subject at all in connection with the sale of his own refinery does so as to the operation of a particular contract to which I will refer that affected everybody in the business. The element which he said was injurious to him, was an element which affected everybody.

I cannot dwell upon the railroad situation of the '70's generally. That is a matter of history. In judging of events and transactions that took place in those times, we have to reconstruct for ourselves as best we can the conditions of those times. It is a difficult operation. But some effort of the kind must be made, because it is useless to judge 1870–1880 by the conditions of to-day, by all that has been legislated and decided since that time. We have to judge each matter by the conditions which existed when it arose. And

if there is any fact established and shown by history—I refer to the history of railroads—it is that in the '70's and even later than that, rates, schedule rates, or whatever you may call them, were merely nominal; that every man who had any amount of freight to ship, to quote the language of the time "shopped around" among the railroads to get the best rate that he could. It was also the time of bitter railroad wars; and efforts and means of adjusting those wars that would not obtain now did obtain in those days.

I simply ask that in looking at any contract, it be looked at in the light of the life of the day when it was made and when it arose, and of its operation under conditions which existed at that time; and that it be not looked at in the light of a condition of things which did not exist.

The first matter that is referred to is one which has been lodged in the case and in the history, or, rather, the romance, of that time, and which seemingly will never die, regardless of the facts, and that is the South Improvement Company.

In January, 1872, the situation was such that the railway men, particularly Mr. Scott, of the Pennsylvania, and the Philadelphia refiners, conceived an idea which they tried to put into force that was certainly comprehensive. It was nothing less than an arrangement which took in the railroads and the refiners, and ultimately was to take in the producers, whereby the whole business should be conducted by one company for the benefit of everybody, and the results equitably distributed between the various interests. A contract was made between that projected company and the railroads whereby rates were fixed, and many other matters arranged as a part of that comprehensive scheme.

Mr. Rockefeller says, in his testimony in this case, that he never believed that it was a practicable scheme. But he says the railroad men believed in it and Mr. Scott was a very powerful person. I think those were the words that he used. He said the refiners in Philadelphia and Pittsburg were great believers in it, and he did not care to take a position that antagonized them. So Mr. Rockefeller and his associates took some of the shares of the stock of the South Improvement Company that were subscribed, but they were a minority interest. Though he did so, he felt perfectly assured that the scheme never could be carried out—that it was impracticable,

but rather than try to convince them by argument he let experience do it.

It was made public, and there was an explosion of feeling and sentiment and everything else in the oil regions. This was in January, 1872. The legislature of Pennsylvania was then in session, and a law was passed right through repealing the charter of the South Improvement Company, and it died then and there. It never went into operation, and not a ton of freight was shipped under the contract that it made. Mr. Rockefeller's prediction in regard to it was thoroughly justified.

In the earlier years of the oil business, and before the Standard had anything to do with them, the oil terminals of various railroads were operated by the oil men, for the reason that it was a special traffic and required special attention. Oil was transported in barrels. They leaked; they needed cooperage; they needed a special place for their reception and transfer to lighters; it was a service of such a special character that the railroad men of that time could not undertake it. They had, as I said, before 1873 and 1874, turned it over to the oil men, and from the beginning it was done under proper regulations with the railroads. In 1874 and 1875 the Standard Oil Company had such an arrangement with the Erie and the New York Central, and for aught I know with the Pennsylvania Railroad, although I think there is no evidence as to the Pennsylvania. What it did was under a contract with the railroads to handle the oil as it was received at the terminals, do the cooperage that was required, and warehouse it or forward it by lighter or otherwise to its destination.

MR. JUSTICE HOLMES: Who did that, do you say? I lost that. Who do you say did these things?

MR. MILBURN: The oil men had always done it, your Honors; and the Standard Oil Company had those contracts in 1873, 1874 and 1875. The rates to be charged for this service, as a reference to the contracts shows, were fixed by the railroads. So far as the New York Central was concerned, it did not want to provide oil terminals if it could avoid it, and the Standard provided them and rendered the terminal service, its compensation being a fixed proportion of its freight on the oil that was transported for it.

Those contracts were in force in 1874 and 1875. As I say,

they followed a usual practice. They were a necessity, or regarded as a necessiry, because the ordinary railroad employees could not handle that kind of traffic. As the largest shipper it fell to the Standard Oil Company; and as long as the contracts were in force, it did that work. I see no evidence showing that the operation of those contracts coerced anybody to sell his property, or affected his business.

The next contract is what is called the "Railroad Pooling contract of 1874." What that contract did was just this: There were the interior refineries in Pennsylvania; there were the seaboard refineries. There had to be some equilibrium established between the rates on crude to the seaboard and the rates on refined to the seaboard if those refineries were to co-exist. This contract provided what are called drawbacks and allowances, so that the man who refined oil in the oil regions and then sent it to New York for export, and the man who got his crude from the oil regions and refined it at the seaboard, paid exactly the same railroad transportation. Thus the seaboard refiner had no advantage over the interior refiner so far as railroad transportation was concerned; nor had the interior refiner any advantage over the seaboard refiner. I do not know whether I make that clear or not, but it is really a very simple matter, and should be put clearly.

All refining points in the interior had the same rates to the seaboard. The interior refiner was refunded the money he had paid for the transportation of the crude to his refinery from the oil field. The seaboard refiner who had received his crude by railroad, was refunded a fixed sum per barrel. The result was that the seaboard refiner was paying exactly the same amount of railroad transportation for his crude oil to the seaboard that the interior refiner was paying for the transportation of his refined oil to the seaboard. In this way both sets of refiners were placed on an equality so far as railroad transportation was concerned. The contract affected all refiners in the same way, and not one differently from another.

There was a contract in 1877—what was known in those days as an "evening" contract. It was a method in vogue, which we read about in the histories of railroad transactions, whereby the railroads kept peace between themselves temporarily; and they did it in this way: They established the proportions of the

traffic that each railroad was entitled to. For instance, take the oil traffic: The Pennsylvania, Baltimore & Ohio, New York Central and Erie—four lines—divided that whole traffic up among themselves in certain proportions. One got eleven per cent., another got forty-six per cent., another got such and such a per cent., and the other a certain other per cent. It was the same with all the big classes of traffic from interior points, to the seaboard. Then the railroads would go to the biggest shipper and say: "If you will make your shipments so as to carry out and observe these percentages, whether it suits your convenience or not, we will pay you so much—give you an allowance on your rate." That was called the "evening" contract. It evened things up between the railroads. It was a crude method, but a great deal has been said in its favor. The Standard, being the great oil shipper, was the "evener" for the comparatively short time that that contract lasted. It shipped to Philadelphia if the Pennsylvania Railroad's traffic was falling off, so as to bring its proportion up, whether it wanted to ship to Philadelphia or not. If the Erie was not getting its proportion, its twenty-four per cent., we will say, then the Standard shipped by the Erie, regardless of its own convenience. That was the plan. And for doing that in connection with certain guarantees as to the volume of traffic, it got, I think, ten per cent. of the rate on its own shipments.

There was a contract with the American Transfer Company in 1878. That was a pipe line company which was building the pipe lines necessary to gather the oil and bring it to the Pennsylvania Railroad—bringing practically all the crude oil that was carried by the Pennsylvania Railroad. It was laying out large sums in construction for this purpose and did not think that what it was paid for gathering the oil and bringing it to the Pennsylvania Railroad was enough. It brought this freight to the Pennsylvania Railroad, and its position was that it should have a portion of the railroad rate, so much a barrel, twenty cents a barrel, or thereabouts, for the service it rendered in connection with the freight. That contract was in force a very short time. It is said that it applied to all oil, whether it was brought by the American Transfer Company or not. But the fact is that practically all of the oil that was brought to the Pennsylvania Railroad at that time

was brought by this American Transfer Company and its associate the United Pipe Lines.

There is also cited under this head a special rate that lasted for a few months in 1878, when the independent refiners had established a route consisting of a pipe line to some place I do not have in mind; thence by railroad to Buffalo, and thence by canal to New York, with a rate of seventy cents. The railroad companies made a rate of eighty cents to meet that rate. That lasted until the canal had closed for the winter. And that reduction of the railroad rate to meet, during the summer, the competitive rate by the canal, is charged to have been a device to give the Standard a rebate.

Those are the railroad contracts that are mentioned. I say you must judge them by the times. I say that they did not bring about the sales of the properties which the Standard acquired.

I want to add only one more word on this subject. I wish to correct what I think is a wrong impression of counsel on the other side. He says that lower rates for larger shipments than for small ones are unlawful at common law. I dispute that proposition. I say that it is well established by English cases and by cases in this country that the natural rule obtained at common law; that a big shipper, a man who brought trainloads, was entitled to, and it was lawful for him to get, a lower rate than a man who brought a carload occasionally, say once or twice a week. I say that was not discrimination at common law. The rule of equality between big and little shippers came in with the Interstate Commerce Act of 1887. It is an arbitrary rule. All the logic is in favor of the shipper who ships trainloads getting a lower rate than the shipper who ships carloads just as in commerce the wholesale price is lower than the retail.

But as a matter of policy, to put everybody on the same plane, the Interstate Commerce Act established the rule of equality. That is what we did, and that is what the railroads and shippers have come by degrees to accept. But, your Honors, a great deal of the rebating that has prevailed was the inevitable protest that always arises in business when an arbitrary rule is imposed upon it which is contrary to the common sense of the situation. The common sense was that

if a shipper sends out a trainload of twenty, thirty or forty cars every day, which goes right through, he should have a better rate than a man who brings a carload three or four times a week. That was the rule at common law. As to the other rule of equality, it has only been gradually accepted. It is practically accepted now; but it has been a slow, hard process.

If the Standard had openly had contracts between 1870 and 1880 or 1887, giving it for its great traffic more favorable rates than the ordinary refiner, they would have been justified in the law so far as they were reasonable. There is nothing here to show anything unreasonable about the contracts to which I have referred.

I have finished with that subject.

I come now to the situation in 1882; and I think it will be better for me to trace onwards from that time first the organic things that were done in regard to the holding of these properties, and then to trace the growth and expansion of the properties and show how many of the corporations came into existence which it is said were naturally competitive and illegally combined. The trust agreement of 1882—I need not go into the agreement in detail, because it is found in the record—was in effect a transfer of all of these joint properties to nine trustees to manage—to hold and to manage. The actual physical properties (which included a great amount of oil in storage) were then on the books at $55,000,000, or thereabouts. They were taken over at what Mr. Archbold said was considered to be their fair value at that time. They were put into the trust at $70,000,000; and the original issue of certificates for the properties, including the stock of the Standard Oil Company of Ohio, was $70,000,000. The trust certificates recited (they were just like shares of stock in that regard) that they represented the holder's interest in the joint property. The provision in the trust agreement is:

"The various bonds, stocks, and moneys held under said trust shall be held for all parties in interest jointly, and the trust certificates so issued shall be the evidence of the interest held by the several parties in this trust."

The Government says that this was a combination of separately-owned independent corporations. We insist that it was a transfer by joint owners of the legal title to the stocks con-

stituting the joint property to trustees, the joint owners retaining the equitable ownership evidenced by the certificates."

At that time, in 1882, the Standard Oil Company of New Jersey and the Standard Oil Company of New York were created. They were created out of the loins of the Standard Oil Company of Ohio. Properties on the seaboard were vested in the Standard Oil Company of New Jersey, and it was supplied with cash capital, and in return the Trustees took its stock. Other properties were transferred and cash capital to the Standard Oil Company of New York, and in return the Trustees received its stock. That is how and that is when the Standard Oil Company of New Jersey came into existence. It is and always has been a great corporation—a great manufacturing corporation. It was created at that time and in that way—in 1882.

MR. JUSTICE DAY: Was that the first Standard Oil Company of New Jersey?

MR. MILBURN: That was the first Standard Oil Company of New Jersey—the only one there ever was.

MR. JUSTICE DAY: There never has been any reorganization?

MR. MILBURN: No, sir.

THE CHIEF JUSTICE: When did they increase their capital stock?

MR. MILBURN: The increase was made in 1899.

MR. JUSTICE DAY: It was organized in 1882?

MR. MILBURN: In 1882.

MR. JUSTICE HOLMES: Then the stock of the New Jersey corporation was held by these trustees?

MR. MILBURN: By these trustees.

MR. JUSTICE HOLMES: And the various human beings who were interested in the trust had trustees' certificates which represented the stock in all these different Standard Oil corporations, and also in anything else that they had?

MR. MILBURN: Anything else that came into the trust estate.

MR. JUSTICE HOLMES: I see.

THE CHIEF JUSTICE: As well as in the New Jersey corporation?

MR. MILBURN: As well as in the New Jersey company. That was the whole scheme—to bring everything in the trust

estate into a single trust. That is when it was brought there. The original idea was (which they modified a day or two afterwards) to organize Standard Oil Companies in the various States where there were properties, and to transfer the property in each State to the Standard Oil Company of that State; when the stocks of those Standard Oil Companies would be substituted in the trust estate for the stocks of the corporations which had been turned over to them.

They did that so far as New Jersey was concerned, and the refineries there, and so far as New York was concerned the refineries there; but it was found impracticable then to carry out that plan elsewhere. The result was that a number of the original corporations continued right along as they were before, their stocks being held by the trustees.

At that time the process of integration proceeded to that extent, and this was the situation: The Standard Oil Company of New Jersey was a great refining company on the seaboard, with the New Jersey refineries, which were largely constructed by it. The Standard Oil Company of New York was another great refining company on the seaboard, with refineries in Brooklyn and on Long Island. The Atlantic Refinery, at Philadelphia, was not turned into a Standard Oil Company of Pennsylvania. It was acquired in 1874, and was continued. There was no Standard Oil Company of Pennsylvania created. The Standard Oil Company of Ohio continued with the refineries at Cleveland as the base for the trade in the west and northwest; and the National Transit Company held all the pipe line interests owned at that time.

That was the situation in 1882.

In 1892 the State of Ohio brought a suit against the Standard Oil Company of Ohio, a *quo warranto* proceeding, which resulted in a decree that it was an *ultra vires* act on its part to be a party to the trust agreement, and that it must withdraw from the agreement. That is an important case, and I want to make just what it decided as clear as I can, because it is used and will be used to the crack of doomto substantiate statements in regard to the trust that are not borne out by the record.

The bill as filed set up the trust agreement of 1882, and alleged that because all the stockholders of the Standard Oil Company of Ohio were parties to it, the corporation itself

was therefore a party though not in name a party; that its participation in the agreement was an abdication of its corporate functions because it vested the control of its stock in the nine trustees instead of in its stockholders, and that it was thereby *ultra vires*, an *ultra vires* act on its part. There was a second count in the bill in which it was alleged that the trust agreement was illegal because it created a monopoly and was in restraint of trade. The Company answered and denied the allegations of monopoly and restraint of trade, and was ready to go to trial on those issues. If the parties had gone to trial on those issues at that time, the facts would have been disclosed as to the common ownership which this case brought out.

The State then amended its bill, withdrawing all allegations of restraint of trade and monopoly, or that this trust agreement violated the law in those respects, and every charge against the Standard Oil Company of Ohio excepting the charge that, treating it as a party to the agreement, it had exceeded its corporate powers in becoming a party to it. A demurrer was interposed to the answer to the amended petition as then framed, and the case came up on that demurrer. No testimony was ever taken. The Supreme Court of Ohio held that the Standard Oil Company, though not in form a party, was through its stockholders, a party; that it was beyond its corporate power to enter into an agreement of that kind; and it was an *ultra vires* act on its part.

"The said corporation has, as alleged in the petition, exercised the power, franchise, and privilege of executing and performing the agreements set forth in the petition contrary to and without the authority of the laws of the State of Ohio, and in violation of the law of its incorporation; wherefore it is ordered, adjudged, and decreed that the said corporation be and the same is hereby ousted from the power, franchise, and privilege of making or entering into such agreements, or from performing the same, directly or indirectly."

But the Court in its opinion, with no issue in the case of restraint of trade or monopoly, without a word of testimony ever having been taken, the issue having been withdrawn from the case by the amendment of the bill, with no knowledge or information before it of the relations of these companies or their origins or anything of the kind, said the trust

agreement was illegal because it created a monopoly and restrained trade.

I submit that what the opinion says on that subject follows neither pleadings nor proofs. There was no pleading raising any such issue; there was no evidence taken or submitted. How then can the case be a binding adjudication that this was an unlawful agreement because in restraint of trade or tending to monopoly?

The case passed off on precisely the same ground as the North River Sugar Refinery case did in the State of New York. There, although the lower court went into the question of monopoly and held that the trust was monopolistic, when the case got to the Court of Appeals, that court held that the Sugar Company being a party to the agreement, it was *ultra vires;* that it was without the corporate power to join in the agreement; and it dissolved the corporation for violating its charter in going into it. It did not consider or pass upon the question of monopoly or restraint of trade (121 N. Y., 582).

Therefore I have a right to say that the Ohio case may not be cited as an authority that this was an illegal combination, as a monopoly or in restraint of trade. The reference to it in the books as such an authority (and it is the case that is put prominently forward) is unwarranted. The Court did not decide that it was a monopoly, although I admit that it said it was in its opinion. There was nothing before the court on which to base that portion of its opinion, and certainly not the facts that are here in this record.

The result of that case was to force the Standard Oil Company of Ohio out of the trust agreement, and the trustees at once surrendered its stock, and it paid no more dividends to them. The Trustees at once dissolved the trust by the machinery provided in the agreement for that purpose. They passed resolutions to distribute all the trust property amongst the certificate holders *pro rata.* There were some of the companies that were no longer necessary; and by transfers of property to this corporation and the other, and the winding up of some unnecessary ones, the stocks of twenty corporations were then held by the trustees. Those are the twenty corporations set out in the bill. Pursuant to the resolutions an assignment was executed to each certificate holder of an inter-

est in the shares of each of the twenty companies corresponding to the number of his certificates.

There were $97,250,000 of the certificates outstanding. This was in 1892—the date of the decision of the case. The illustration given in the bill is of Mr. Rockefeller's assignment. He owned just about a quarter, 260,000 shares or certificates. Therefore he got an assignment of his 260,000 972,500ths of the stocks of each of the twenty separate corporations. Every certificate holder was entitled to a like assignment.

There were about three thousand holders of these certificates at that time—a body of common owners. Many of them were very small holders.

Certain large holders surrendered their certificates, obtained their assignments, and converted their assignments into the shares of the separate corporations to which they were entitled. Just more than a majority in interest did that. So that every corporation then had more than a majority of its stock in the hands of the men who had surrendered their certificates. The Trustees advertised for people to bring in their certificates for surrender, but the small holders did not bring them in. There was no coercion exercised to bring them in.

That transaction is criticised in the opinion of the Circuit Court. It is said that the dissolution was effected in a way to preserve the common control. Of course it was.

MR. JUSTICE HOLMES: Which one is this?

MR. MILBURN: The court below said in its opinion that the mode of dissolution or distribution adopted tended to preserve the common control. Of course it did.

MR. JUSTICE DAY: How many companies were there in which stock was taken?

MR. MILBURN: At this time, your Honor? Twenty companies in 1892.

THE CHIEF JUSTICE: It just left them exactly where they stood, practically, except that they were transferred? I mean, the ownership was the same?

MR. MILBURN: One man had his shares in the separate companies and another man had his certificates representing his shares. But here is the point, your Honor: It is said: "Why did you not coerce all the holders to surrender their certificates and take their shares in the separate companies?"

It would have been cruel to do so. What would have happened to the small holders if they had been coerced? We have an illustration in the decree in this case, that we have to execute if you affirm it. There are five thousand stock-holders of the Standard Oil Company of New Jersey, many of them small ones. To-day they have their one hundred dollar shares of the stock of that Company. There are, I will say, $100,000,000 of those shares. (There are ninety-seven odd millions.) That is, a million shares are outstanding, representing $100,000,000 par value. The market value is $600 a share. The shares, therefore, represent $600,000,000—the $100,000,000 of shares of the Standard Oil Company of New Jersey—to-day. If a man owns ten shares of those stock, they represent a value of $6,000, and they represent his interest in all of these properies. We have to distribute the shares of the subsidiary companies. We have to leave him his shares of the Standard Oil Company of New Jersey, and we have to give him his proportion of the shares, I think, of thirty-seven corporations. He keeps his shares of the Standard Oil Company of New Jersey, but they represent a mutilated corporation. He is entitled to his proportion of the shares of all the other companies. If he owns one share of Standard Oil stock, he will get in the Standard Oil Company of Indiana a fractional interest of one dollar. He will get in the smallest one, the Chesebrough Manufacturing Company, a fractional interest of 28 cents—an interest of 28 cents in a very prosperous concern! I could take up all of these corporations, and show you that a share of stock of the Standard Oil Company of New Jersey will represent anywhere from $2.50 down to 28 cents. It takes 100 shares of the stock of the Standard Oil Company of New Jersey, worth $60,000, to get one share of the stock of the Standard Oil Company of Indiana. The shares of the Standard Oil Company of New York, the National Transit Company, and of the other subsidiary companies were never on the market. They have no market value. And each of the small holders will get this handful of scrip to represent his interest in the Standard Oil organization.

MR. JUSTICE DAY: You may have stated (but it has escaped me if you did) what percentage of the certificate holders took stock.

MR. MILBURN: Fifty-two; fifty-one per cent. not in numbers but in interest. They held their shares together until some plan was devised in regard to these common properties, your Honor. They held them from 1892 to 1899, wondering what they could do, and not calling upon the small holders to surrender their certificates, because they could use them in their banks, and sell them; and if they had brought them in and given them up in exchange for fractional interests in the different corporations, they would have had nothing that they could use, nothing that they could borrow money on. If they had done that they could only have sacrificed their fractional interests if they had to use them. What are the small holders going to do now if this decree is to be executed—the people who have $10,000 or $15,000 or $30,000 worth of Standard Oil stock? Their shares are the family provision of many people. What are they going to do with all of the fractional interests they are bound to receive under the decree? They will be at the mercy of speculators. If the big men of the company want to get it all, there is their opportunity.

What we are going to do under those circumstances I do not know. We will have to do the best we can, but it is an awful situation. We could increase the stock of some of the subsidiary companies if we had time. We are given thirty days to disintegrate this organization. We might, for instance, increase the capital stock of the Standard Oil Company of Indiana to the value of its assets, so that a share of Standard Oil of New Jersey stock would be entitled to a fractional share of twenty-five dollars in that company instead of one dollar. I cannot help thinking of the matter from these practical standpoints. I do not wish to magnify anything. I do not want to prophesy calamity. I am an optimistic person, and think that somehow or other we will work it out—but I do not know how. I stop to say this because it is the reason why the small certificate-holders were not coerced back in 1892, to come in and give up their certificates, which they could use, and receive for them a lot of stuff which they could not use.

MR. JUSTICE DAY: This was in 1892?

MR. MILBURN: This was in 1892, at the time of the dissolution; and the court misapprehended the situation, or it would not have criticised what was done. Mr. Archbold said

it would have been cruel, it would have been wrong, to coerce the small holders at that time.

We come now to 1899, and the plan of that year to preserve this common property and its management with due respect to the separate corporations and their obedience to the law of their being, which was the transfer of the shares of the subsidiary companies to the Standard Oil Company of New Jersey. It was the biggest corporation in the common ownership. All these owners, whether they owned the shares of stock into which they had converted their certificates, or held their certificates, owned the same proportion of the Standard Oil Company of New Jersey and of all the other twenty corporations. Every man had precisely the same proportionate interest in each corporation as he had in the Standard Oil Company of New Jersey.

They all transferred the shares that their certificates had represented to the Standard Oil Company of New Jersey, and it issued its capital stock for them, and acquired them in that way. After that was done, a share of the Standard of New Jersey represented just what a certificate of the trustees had represented before. That is the simplest way to put it; and it was arranged so that the small holders could make the transfers without inconvenience. A stipulation in the record covers the method adopted with respect to them.

MR. JUSTICE DAY: You have not stated, Mr. Milburn, and I suppose we are to infer, what was done with the stock of these smaller outlying companies at the time of the increase of the capital stock.

MR. MILBURN: There were only twenty companies at the time of the dissolution. Preparatory to it, as I said, in 1892, they had wound up some of the companies that were unnecessary, and had transferred the properties of others so as to reduce those held in the trust to twenty companies, one of which was the Standard Oil Company of New Jersey. The stocks of the twenty companies were all the stocks the trustees then held.

MR. JUSTICE LURTON: What became of the property of those companies that are lost sight of?

MR. MILBURN: All were in the twenty companies.†

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†NOTE: There was in addition a considerable number of other companies whose stocks were thereafter held by one or other of the twenty companies.

MR. JUSTICE LURTON: That is, the twenty absorbed the others?

MR. MILBURN: Yes; their properties or their stocks. For instance, there was the Chesebrough Manufacturing corporation, which makes a by-product, in which the Standard Oil Company had taken an interest.

MR. JUSTICE DAY: Their property or stocks were conveyed to the Standard Oil Company of New Jersey?

MR. MILBURN: Its stock was transferred to the Standard Oil Company of New Jersey before this time in 1892 in connection with the dissolution of the trust to simplify it. It was just as if to-day, your Honors,—

MR. JUSTICE DAY: I am asking you for the fact, the date. That was done in 1899?

MR. MILBURN: That was done, your Honor, in 1892, at the time of the dissolution proceedings; the companies were then reduced to twenty in number.

MR. JUSTICE DAY: I know; but what became of the twenty?

MR. MILBURN: They are all in existence.

MR. JUSTICE DAY: And holding their properties and stocks?

MR. MILBURN: Yes. They are in existence, and their stocks are held by the Standard Oil Company of New Jersey.

MR. JUSTICE DAY: Exactly; that is the fact I am asking for. When was that stock turned over to the Standard Oil Company of New Jersey?

MR. MILBURN: In 1899. A man brought his certificate, which represented his interest in all of those companies, to the Standard Oil Company of New Jersey, which was one of the twenty companies in which he owned the same interest, and he transferred what a certificate represented of fractional shares in all the companies to the Standard Oil Company of New Jersey, and got back a share of its stock in return. It is a very simple proceeding, your Honor, if I could make it clear.

If I myself owned a certificate of the trustees, that represented my interest in all of the trust properties. Now then, I came to the Standard Oil Company of New Jersey, and it gave me a share of its stock; and that share then represented just what my certificate had represented.

MR. JUSTICE DAY: Of course, as the basis of that, the

Standard Oil Company of New Jersey had acquired the stock of the twenty companies?

MR. MILBURN: It acquired them through these transfers of 1899.

MR. JUSTICE HUGHES: As I understand it, the stocks of these twenty companies were held by trustees at the time of the dissolution?

MR. MILBURN: Yes, sir.

MR. JUSTICE HUGHES: And when the new arrangement was effected, those stocks were held by the Standard Oil Company of New Jersey instead of by the trustees?

MR. MILBURN: Practically that, your Honor.

MR. JUSTICE HUGHES: And those who had held the certificates from the trustees, after that arrangement was effected held the certificates of stock in the Standard Oil Company of New Jersey?

MR. MILBURN: Excepting that in 1892 the majority in interest of them, for purposes of administration, converted their certificates into the actual shares of the companies. Some did not. They never converted until the very end. Then, at the very end, they surrendered all their shares and interests in the subsidiary companies for shares of the Standard Oil Company of New York.

MR. JUSTICE HUGHES: I mean, that was the process?

MR. MILBURN: That was the process.

MR. JUSTICE HUGHES: So far as it was carried out, that was the process?

MR. MILBURN: The men that had held the $97,250,000 of certificates when the transaction of 1899 was completed, owned $97,250,000 of the shares of the Standard Oil Company of New Jersey.

MR. JUSTICE DAY: Did this process result in taking up all the certificates?

MR. MILBURN: Every certificate.

MR. JUSTICE DAY: There are no certificate holders now? All of them have shares of the Standard Oil Company of New Jersey?

MR. MILBURN: Yes, sir; they all have shares of the Standard Oil Company of New Jersey.

MR. JUSTICE MCKENNA: That, though, under the decree, is to be turned back to them; is it not?

MR. MILBURN: That, under the decree, and much more, has to be turned back to them.

MR. JUSTICE MCKENNA: The status prior to the organization of the Standard—the status of 1899—would remain; would it?

MR. MILBURN: No; a great many changes have taken place since then—a great many changes. It is this transaction of 1899 that the court below held to be a combination in restraint of trade and in violation of Section 1 of the Sherman Act.

MR. JUSTICE DAY: Was the turning in of the shares of stock of these twenty companies to the Standard Oil Company of New Jersey what the court below held to be a combination?

MR. MILBURN: Yes, sir.

MR JUSTICE HUGHES: As I understand it, the stock of the Standard Oil Company of New Jersey was itself held, prior to the increase of stock and the new arrangement, by the trustees?

MR. MILBURN: By the trustees.

MR. JUSTICE HUGHES: Yes. In other words, the stock of the twenty companies was held by the trustees?

MR. MILBURN: Precisely.

MR. JUSTICE HUGHES: And one of the twenty companies was the Standard Oil Company of New Jersey?

MR. MILBURN: One of the twenty companies was the Standard Oil Company of New Jersey.

MR. JUSTICE HUGHES: When the new arrangement was effected, the net result of it was that the Standard Oil Company of New Jersey stood in place of the trustees; and those who owned the various interests in the stocks of the twenty companies represented by the beneficial certificates issued by the trustees thereafter held directly as stockholders of the Standard Oil Company of New Jersey, which had taken the place of the trustees?

MR. MILBURN: Precisely. So you had a change in the form of the common ownership, and that is all. It was a transaction of common owners, who had been such from the very beginning.

MR. JUSTICE LURTON: I suppose, Mr. Milburn, you undertake to distinguish between that situation and that in the

Northern Securities case? Was or was not this New Jersey corporation a holding company?

MR. MILBURN: That is going to be discussed, your Honor. Will you let me take that up when I come to it, if I ever do? It is not in my province, but I may come to it.

MR. JUSTICE LURTON: Oh, certainly. It arises at the time when we are getting these facts; but go ahead. Let it come up in its due order.

MR. MILBURN: In the Northern Securities Company case there was Mr. Harriman who had acquired for the Union Pacific lines a majority of the stock of the Northern Pacific; there was Mr. Morgan, who owned Northern Pacific, and his associates; there was Mr. Hill, who owned Great Northern, and his associates, and also Northern Pacific. Those separate and diverse interests met and organized the Northern Securities Company.

THE CHIEF JUSTICE: In other words, in the Northern Securities case, each man by the effect of that arrangement got an interest in property which before he had no interest in?

MR. MILBURN: Precisely. Take, for instance, the Harriman interests: They bought Northern Pacific until they thought they had control of it, but they had not a dollar of interest in Great Northern until the Northern Securities Company was organized and through it.

MR. JUSTICE LURTON: Was there not a power of competition in each of these corporations as against every other before that transfer?

MR. MILBURN: Was there a power of competition?

MR. JUSTICE LURTON: Yes.

MR. MILBURN: Now, your Honor—

MR. JUSTICE LURTON: Was there not a potentiality of competition existing there?

MR. MILBURN: I am now going to a branch of my subject which brings out whether they were competitive, potentially and naturally competitive, or not. I want to trace how many of these principal corporations came into being; and then I think the whole picture will be before you.

THE CHIEF JUSTICE: You are approaching now the question whether they were either potentially or otherwise com-

petitors before the taking of the interest by the New Jersey corporation ?

MR. MILBURN : Precisely. I have followed the stream down to the formation of the trust of 1882 ; and I showed you what was then the volume of production and the volume of business. Let me compare or contrast the conditions then with the conditions in 1906 when this proceeding was begun.

In the first place, the total crude production in the United States in 1881—that is, at the time the trust was entered into—was 25,000,000 or 26,000,000 barrels per annum. In 1906 it was 126,000,000 barrels. The value of the Standard refineries in 1882 was $17,000,000. In 1906 it was $58,000,000. The pipe-lines in 1882 were 3,531 miles in length. In 1906 they were 54,615 miles in length. The marketing stations (that is, where they had storage places from which the tank-wagons are loaded and go to serve the retailers) were 150 in 1882, and in 1906 they were 3,573.

MR. JUSTICE HOLMES : What was the first year that you contrasted with 1906 ?

MR. MILBURN : 1882.

In 1882 the oil field was confined to the Appalachian field, which was a part of Pennsylvania, running a little into New York, a little into West Virginia, a little in eastern Ohio, and a little in Kentucky. In 1906 the oil fields existed in fifteen States. There was the Lima-Indiana field in western Ohio and eastern Indiana ; there was the Illinois field, extending beyond that ; the mid-continent field in Oklahoma and Kansas ; the Texas field ; the California field ; and the last to burst forth with the best oil that is produced except in Pennsylvania, is Louisiana. In the new Caddo field, in that State is now a large production, which started since the last argument of this case.

I have given the figures of the two periods. How did the growth occur ? Let me describe it.

From 1886 to 1888 there came, and demonstrated itself as a substantial thing, a production of oil in what is called the Lima-Indiana field, which is situated in western Ohio and eastern Indiana. It then began to come in great volume. That oil is impregnated with sulphur to such an extent as to be very difficult to refine, and is not refinable without some special process which eliminates or substantially eliminates the sul-

phur. Inasmuch as the Pennsylvania field was then declining, it came as a new and needed development. It sold as low as fifteen cents a barrel, because it could only be used for fuel purposes.

It was a great field. It was open to everybody to go into it. The Standard Trustees believed they could discover a process which would refine the oil on any scale, no matter how much of it there was—not simply refine minor quantities of it. So they went in there, and built pipe-lines and storage tanks; they put its chemists at work; and they devised a process by which the production of the field could be refined on any scale. They organized the Standard Oil Company of Indiana, which built the great refinery at Whiting. They organized the Solar Refining Company, which built the refinery at Lima, Ohio. They took all the oil that was offered from the field. A little along the northern fringe of the field could be used for refining by ordinary processes, but only on a small scale. They built the trunk pipe-line to Whiting, Indiana, to supply the refinery there from the field, and also one to Cleveland to supply one of the refineries there. The price of the crude went up from fifteen cents to as high as $1.30 a barrel; and all of it found a market. These are the developments that followed the discovery of the Lima-Indiana field.

That is the origin of the Standard Oil Company of Indiana. The Trustees organized it with a million dollars of capital, and furnished all the money for the construction of its plant and the establishment of its business. The same is true of the Solar Refining Company and its refinery at Lima. They furnished all the money to build the pipe lines. They furnished all the money to build the tankage for as vast a quantity as 20,000,000 barrels at one time.

There in its totality is one great creation. The Standard Oil Company of Indiana to-day supplies a population of 20,000,000 people in the region which it occupies. And yet you have before you a finding that it is potentially competitive or naturally competitive with the Standard Oil Company of New Jersey!

MR. JUSTICE LURTON: Is all of the stock in the Indiana Company held by the Standard Oil Company of New Jersey?

MR. MILBURN: It is all held by it excepting the qualifying shares for directors. The common ownership created it.

The trustees of the common owners created it, and created the Solar Refining Company, and created the Buckeye Pipe Line Company to own and build the thousands upon thousands of miles of pipe lines for the Lima-Indiana field—to take the oil of that field which was open to everybody. How can those corporations be held to be naturally competitive? I take naturally competitive to mean that according to the normal law of their being they would be competitive; and yet the relation between them and the common ownership is that of parent and child, creator and created. The stock of the Standard Oil Company of Indiana has to be distributed and scattered under the decree in this case. Why? So that there may be a possibility of its ownership getting separated from the ownership of the Standard of New Jersey; and, through that disintegration, competition may be brought about between the Indiana and New Jersey Companies.

MR. JUSTICE LURTON: What was the decree of the Court below with respect to the stock in the Indiana corporation?

MR. MILBURN: It forces the distribution of the stocks of all the Companies without discrimination—

MR. JUSTICE LURTON: But what becomes of it? Who is to get the stock?

MR. MILBURN: Well, sir, a man who owns ten shares of the Standard Oil Company of New Jersey when the distribution is made will get an interest of ten dollars in the Standard Oil Company of Indiana. He will have scrip for ten dollars.

MR. JUSTICE LURTON: He is to get a share?

MR. MILBURN: He cannot get a share, sir. He can get scrip which will represent—

THE CHIEF JUSTICE: An aliquot part of a share?

MR. MILBURN: An aliquot part of a share.

MR. JUSTICE LURTON: It is a distribution of the supposed value of the Indiana property, represented by scrip amounting to a share of the Standard Oil Company?

MR. MILBURN: No, sir; it is a distribution of the stock of the Indiana Company which is held by the New Jersey Company to the stockholders of the latter Company. After the distribution, the New Jersey Company will not own the $1,000,000 of shares of the Indiana Company, but its stockholders will.

MR. JUSTICE LURTON: The stockholders will?

MR. MILBURN: Yes, sir. That is forced, not on the theory that they ever were competitive, that they ever did compete, but on the theory that the law can coerce and bring about a condition of things which may bring competition into being.

MR. JUSTICE LURTON: You said the capital stock of the Indiana Company was only $1,000,000? Is that it?

MR. MILBURN: $1,000,000. It should be $25,000,000, we will say.

MR. JUSTICE LURTON: The value of the property is $25,000,000?

MR. MILBURN: The assets, the last I knew of them, in 1906, were about $24,000,000; and I suppose, if there were time, and men were going about this thing to do it properly, if there is to be a change of the status, they would increase its capital stock; and then, for each share of Standard of New Jersey that a stockholder owned he would et—instead of getting one dollar—$25 or a quarter of a share of the Indiana Company.

I have shown you how the Standard Oil Company of Indiana came into being. Let us now go to the next oil field. There were in 1898 signs of substantial development in California. It presents a very interesting situation. There had been efforts to refine the California crude, and some refining; but the product could only be made merchantable by mixing thirty per cent. of the California refined product with seventy per cent. of eastern oils.

As there were more and more signs of greater production, the Standard, which had never been a refiner out there, made up its mind that it was a field where refining should be done on a large scale. It found a company there called the Pacific Coast Oil Company, with forty or fifty acres of producing property, a pipe-line from that producing property to the coast at Ventura, and a little tank steamer to take the crude up to San Francisco harbor, where it had a little refinery with a capacity of 260 barrels a day. For $760,000 it bought that refinery and the production, the whole thing, in the year 1900 to experiment and work out a means of refining the California crude; and it discovered a process by which it could be refined. I do not say that other refiners have not processes by which it can be refined; I do not say that it discovered the only process; but it went to work to discover a

process that was satisfactory to it; and did discover one. And what was the result? *It was the Standard Oil Company of New Jersey itself that did this.*

MR. JUSTICE HOLMES: In what year?

MR. MILBURN: 1900 and 1901; that was when it began this development. It discovered a process; it built a refinery with a capacity of 25,000 to 28,000 barrels a day; it built pipe-lines to the newly-discovered oil fields in California, which are now a part of its pipe-line system; and it put $17,000,000 of money in the construction of that refinery and the establishment of the plant in its entirety.

The old refinery is listed in the Government exhibit as a dismantled refinery, though we substituted a refinery of 28,000 barrels a day for one of 260 barrels a day that was moribund, and the new one is one of the great refineries of the country. The name of the company was changed to the Standard Oil Company of California, and that is how the Standard Oil Company of California was created. It now has an enormous business; there is a production of 40,000,000 barrels a year in California; but all the figures are in the brief.

MR. CRAWFORD: Nine millions.

MR. MILBURN: The total production of the field is 40,000,000, and we take only a part of it. It is a most interesting story—the development of that business. The export trade grew from something like 60,000 barrels in 1902 to over a million in 1906. But I cannot stop to go into details. The plant and its pipe-line system and its great business are entirely a creation of the Standard of New Jersey out of its own funds, and yet by the decree they are to be torn from it that a separate ownership may possibly arise.

The substantial production of oil in Texas occurred in the years 1898–1900. I have not time to go from field to field in any detail, but I must say a word about the Texas situation. The Standard would like to have established refineries in Texas, but it thought there were prudential reasons why it should not, and it did not, itself. There is an enormous mass of testimony about that. In one part of the Texas field two Standard men under the name of the Corsicana Refining Company, with money advanced by one of the Standard companies, built a refinery. In another part there was a company known as the Security Company which

built a refinery, the stock of which was owned by an English company. The Government's claim is that they were Standard companies. They were certainly friendly to the Standard. They were not owned by the Standard Oil Company of New Jersey, but they were friendly companies. It was perfectly legitimate to utilize the Texas production; but there was a very peculiar anti-trust law in Texas; and the Standard was embarrassed in the establishment of new plants in Texas by the ownership of its interest in the Waters-Pierce Company, which was then in Texas. It is not embarrassed any longer, because the State of Texas eliminated the Waters-Pierce Company by the imposition of a fine of $1,300,000 or thereabouts, which, within a small amount, was just the value of the Texas property of the Company at that time. So the State took it all, and it is gone from there.

But the Government says that the Corsicana and Security companies are Standard companies. Let us assume that they are Standard Companies. Then they were established there as new ventures in a new field to compete with any other interests. I could never understand why there was such an effort on the part of the Government, to show that they were Standard companies, when if they are Standard companies they present no question of the acquisition or elimination of competitors, but were new creations.

Next came the mid-continent field in Oklahoma and Kansas in 1900. It proved a wonderful field. A great production began to manifest itself in the years after 1900 that was open to all the world. All the world could go there and mine for oil, and build pipe-lines, and do what they pleased. The Standard went there and organized the Prairie Oil and Gas Company, which is a private corporation, to deal in oil. It built gathering lines and a trunk line to Griffith, Indiana, to supply the Whiting Refinery, and through connecting lines to supply the refineries in Pennsylvania, New York and New Jersey. There was an enormous development through the Prairie Oil and Gas Company of trunk-line mileage and gathering lines. The Standard Oil Company of Indiana built a refinery at Sugar Creek, Missouri, to refine the oil of that field; and the Standard Oil Company of Kansas was created, which built a new refinery at Neodesha, in Kansas, for the same purpose. All of that pipe-line mileage,

and the two new refineries, were created by the Standard. They were built by Standard companies—purely Standard creations. Was it a conspiracy or combination, to go into that field and buy the oil and refine it? The Gulf Company of Texas—a big company; the Texas Company of Texas, another big company—both independent companies—built pipe-lines; built refineries on the Gulf, and get their oil from that field. Anybody could have done what they did and what the Standard did.

This is another illustration of how the pipe-line mileage has grown, how the refining capacity has grown—by new creations of the Standard itself, and why should they, the Prairie Oil and Gas Company and the Standard Oil Company of Kansas, be severed from the main company?

Finally, in 1906, the Illinois field began producing to a substantial extent a quality of petroleum that is refinable. Leaving out the new discovery in Louisiana, the Pennsylvania oil is the best as to quality; next in order of quality is the mid-continent; and next comes the Illinois crude. The oils of Texas and California and Lima-Indiana, need treatment; they need special processes. A refinery was built at Wood River, Illinois, by the Standard Oil Company of Indiana to refine the production of the Illinois field on the spot, which involved more pipe line construction.

Along with these developments great changes took place in the old refineries. There is no semblance between the present and the original refineries. Take Bayonne, New Jersey. In the deal with the Pennsylvania Railroad in 1877 there was some real estate acquired at that place, and the beginnings of a small refinery. The Standard Oil Company of New Jersey got that property in 1882, as I have already said, when it was organized. It has been there ever since, increasing the original refinery, adding new refineries, and increasing its trade. To-day the Standard Oil Company of New Jersey refines at Bayonne more oil than was refined or than was produced in 1882. It refines more oil there to-day than all the Standard refineries did in 1882. All that additional capacity has been created by new expenditures. The same is true, though in a less degree, of the Atlantic refineries in Pennsylvania; the Atlas refinery, at Buffalo, and the others. The original investment of seventy or eighty

thousand dollars when the Atlas was bought has now developed into $2,000,000. So everywhere it has transformed its plants.

The pipe-line system has grown from 3,000 to over 50,000 miles by the pipe-lines that have been built for the Lima-Indiana field, for the Mid-Continent field, for the California field, and for the Illinois field. It is practically all a Standard creation. I will come to what there has been of acquisition in a few moments. The fact is that it is the developments I have just described which account for the growth of the business and plants of the Standard in the twenty-five years which have elapsed since 1882.

Let me mention in this connection the development of the marketing side of the business. In 1886 the Standard Oil Company of Kentucky was organized to do a marketing business largely in the south, supplemental to the refining facilities of the refining companies, with a nucleus of an acquired business, or an interest in an acquired business, which I have already mentioned as the business of Chess, Carley & Co., at Louisville. The Continental Oil Company was organized in 1885 as a marketing company for the Rocky Mountain States, the nucleus of which was an interest in a marketing business carried on there by a Mr. Blake. Both of these companies have grown and extended their facilities enormously from year to year. In 1888 the Anglo-American Oil Company, which is the marketing company for the British Islands, was organized. Why sever that company created by the Standard for its foreign trade? It has no business in this country. It gets its oil here and sells it only over there and nowhere else. It can only exist by virtue of the relations which it has to the Standard refineries. I should have mentioned as I went along, and for fear I may forget it altogether I will mention it now, that all these separate entities are parts of an organism, members of a great single business. Tear them apart and who knows what will become of them or what their value will be? The Standard Oil Company of New York is used by the others as a great marketing company. Can any one know anything about the value of the Standard of New York when there is a severance? These companies have no independent existence from the point of view of value.

The Colonial Oil Company was organized for foreign trade in 1901. The Standard does business all over the globe

wherever men use oil and the products of petroleum. That fact has necessitated the organization of a great number of foreign companies—in Germany, Italy, Turkey, Moldavia, and everywhere. We hear of the enormous number of corporations that are controlled by the Standard. Will any lawyer tell me how a great manufacturing business, with plants in different States and property and marketing facilities in all the States and many foreign countries, can be carried on without a great many allied and subsidiary corporations? The learned Attorney General knows as well as I how such corporations have to be multiplied in connection with a world-wide business. Hence the number of corporations is indicative of nothing.

I must mention another matter in the development of the business, and then I am done with this branch of my subject.

Along in the '90's the Standard put into practice what it believed to be a sound policy; and that was to establish its marketing stations all over this country. That is why it now has over 3,500 instead of only the 150 that it had in 1882. At those stations it has tanks for the storage of oil and tank wagons for its distribution. It is by this means that it reaches the retailer, and it is with the retailer that it now deals. That step necessarily affected a great many jobbers who were in the business when it did not reach the retailers; and the effect upon them I will explain when I touch upon another subject. I want the Court to appreciate just at present the fact that it has so multiplied its facilities as to deal directly with the retail merchant all over this country, and it is carrying out the same policy more and more in foreign countries. To-day the oil that flows out of the wells in Oklahoma is delivered in India by Standard instrumentalities from the beginning to the end, and without ever being confined in a case or package of any kind. The oil flows through the pipe lines from Oklahoma to Bayonne, is pumped into the refinery, is pumped from the refinery into the tank steamers which go to India, is pumped from the tank steamers there into the tank railroad cars, out of which it is pumped into storage tanks, from which the tank wagons are supplied for local delivery. Only a complex, highly efficient and constantly extending organization could accomplish such a work and successfully undertake all the operations of a worldwide business of this character.

I now pass to the question as to what has been acquired since 1882. I have shown how much has been original creation since that year to meet the demands of new oil fields and an expanding trade. How much has been acquisition of competitive plants? I believe that is deemed of some importance now-a-days. I have always assumed that competitive plants could be bought and sold. I have never found any rule or principle of the common law to the contrary. But now it is argued that when competitive plants are acquired we are pretty near the prison house because the great regulative statute which we call the Sherman Act is a criminal statute. The modern tendency of framing these regulative statutes as criminal statutes is making the lot of the lawyer a very difficult one in determining what can be done and what cannot be done under them. If he is wrong in his construction or application of the statute, the result is not that he involves his client in money loss, which is unfortunate, but not irretrievable, but in a criminal prosecution. I mention that fact for what importance it has. I will give the facts as to what acquisitions of that kind there have been. Others will discuss how much of a figure they cut in the legal solution of the case.

There have been acquisitions since 1882 and since 1890. I have said before, and I say now, that they were not matters of substance; that is, they did not affect the history and development of the Standard organization. The acquisitions prior to 1882 I have already discussed.

From time to time since 1882 refineries have been bought—some small, and some more important. There never has been a time when refineries were not going out of commission, and the Standard has always been willing when a refiner could not go on because of lack of capital, or inability to cope with the changing conditions of the business, or whatever the reason, to buy his refinery at its value. There have been purchases of refineries worth only $14,000 or $15,000 as late as a year or two before this case was begun. Can any motive be attributed to them than the decent one of relieving such men of a total loss without any detriment to the Standard because it could utilize the materials in the plant? There are several in that category. There are five or six such refineries in Cleveland listed in the Government's table of acquisitions. One of the vendors testified that he could not go on; that the appraised

value of his refinery was $14,000; and that he offered it to the Standard. Some of his neighbors did the same with their refineries. They took it at the appraised value, and paid him his $14,000. They need not have given him a penny. If they had not taken it his business would simply have died of dry-rot. Those conditions have always existed in this business from the beginning. There have always been refiners on a small scale who could not keep the pace; whose plants were becoming worthless on their hands; who had to retire; and who turned to the Standard as a purchaser to realize what value their plants had. They had a little trade, and the Standard got the benefit of that. It could utilize the materials of the refineries, the tanks, pipes, and so on—a great deal of it. There have been at all times acquisitions of that sort. Since 1882, fifteen or sixteen refineries, mainly of that class, have been acquired for relatively speaking small sums.

There was a pipe-line system, the Crescent, a trunk-line from the oil regions, 271 miles long, to Philadelphia, with some two or three hundred miles of gathering lines. That was a separate system. It was owned by the Mellons, who I believe are rich and powerful people. They wanted to sell and the Standard bought it in 1895. That is the only important independent pipe-line acquisition that there has been since 1882, in the growth of the system from 3,000 miles to 55,000 miles.

A few other minor pipe-lines were acquired with the refineries to which they were attached. Forty or fifty miles of pipe-line were acquired with the refinery of Holdship & Irwin. Mr. Irwin was a witness in this case. He sold his refinery in 1886. Why did he sell? The Government put him on the witness stand, and pressed him to show that he was driven out. He testified: "I could read the handwriting on the wall. That is one reason why we sold out. We could see that the Standard Oil Company were getting great facilities for doing business; they had pipe-lines to the seaboard, and they had agencies all over the country—tank stations and all that. We could not compete with them in that respect." There was a man with an ordinary refinery. He sized up the conditions—that the business had assumed such a form that if he was to go on it would have to be with capital and expansion—and he sold. Most of the refinery acquisitions since 1882 were of that character.

There were two refineries built by a Mr. Reighard (I do not know whom he was representing)—one at Philadelphia and one at Pittsburg, known as the Globe refineries, with a gathering pipe-line system attached. The Cudahys, well known in another industry, built a refinery with a pipe-line system attached in Indiana. When these refineries were completed, or just about the time that they were completed, they were sold to the Standard. There is no evidence of any coercion. We have no more information in the record as to their reason for selling than that. They were substantial refineries. My own inference—we can all draw our inferences—is that if men like the Cudahys, or whoever it may be, build a refinery plant and sell it right out before it is completed, it was probably built for that purpose. The Standard has not been immune from such ventures. It is a very serious practical situation that faces any important industrial organization when a large plant is built, and it is intimated that it can be purchased or operated to cause a great loss, which can easily be done because a big concern is very vulnerable in that regard. I am not saying that that was the case here. It is just my inference—my explanation. I do not see why, if those people had gone into the business seriously, they should sell out when their refineries got to the point of completion.

There was another refinery in Ohio with a pipe line system attached which was built some years ago by New York men interested in the illuminating gas business. They were not oil men and their participation in the business was an incident to their acquisition of properties to obtain a supply of gas, gas producing territories being also in many instances oil producing. This company was called the Manhattan. You will hear a great deal about it. Its stock was acquired in 1899 or 1900. The Standard of New Jersey could not acquire the pipe-line system because of a State law; and it does not hold the title to the stock of the Manhattan Company. It never acquired it. Friendly interests did; and the pipe line is connected with the Standard system. The owners of the Manhattan obtained a contract from the Standard Company of Indiana for a ten-years' supply of natural gas and sold their plant. This is a sufficient statement of that transaction.

I have now substantially covered the refinery and pipe-line acquisitions since 1882. They added nothing to the power

and structure of the Standard. They cut no figure. Its course and history would have been the same without them. The acquisitions did not curtail the production or diminish the refining capacity necessary to supply the trade to its fullest extent. And of the growth of the Standard's pipe-line system from 3,000 miles in 1882 to 54,000 miles in 1906 not more than 1,000 miles were acquired, including the Crescent system.

When in the '90's the Standard adopted the policy of reach- the retail merchants themselves, through the establishment of stations all over this country, the jobber had necessarily to a very large extent to go out of business. He was buying from the Standard Oil Company and making a profit in selling to the retailer. When the Standard reached the retailer the jobbers' profit was eliminated; and a great many of their (the jobbers') plants, mainly consisting of wagons and storage tanks (many of them very insignificant) were at their solicitation taken by the Standard at their value. They were no longer of any use to them. There are fifty or sixty of those little marketing concerns, and some that you would not describe as little, that were acquired under those conditions.

I wish now to say a few words about dismantling, as to which we have heard a good deal. As these refineries were acquired there was no reduction of the total output. No refinery was ever acquired to reduce the volume of the product which was being manufactured. On the contrary the output has always been increasing. The Standard bought refineries under the circumstances I have stated, and it has utilized them by consolidation and by the use of their materials. There was nothing else to do with many of them because they were sold for the reason that they could not be successfully and economically operated. They would buy such refineries to-morrow, unless some ban is put upon them. If a refiner goes out of business or wishes to sell they will give him the value of his refinery. They need not do it, but they can utilize the materials; they acquire what trade he has, and he is saved from the loss of the value of his plant.

I have endeavored to present to you as fairly as I can the development of this institution both in its internal and external aspects. I have shown you the corporations that it has itself created. I have shown, if we fix the end of the period

of substantial acquisition at 1879, 1880 or 1881, what it had acquired prior to that time, and I have shown what it has built itself, what corporations it has created, what it has acquired, and what the course and development of the business has been since that time. Those are the facts on which it has to be determined whether it is a combination in restraint of trade or not.

THE CHIEF JUSTICE: You may suspend here, Mr. Milburn.

Thereupon, at 4:30 o'clock P. M., the Court adjourned until to-morrow, Friday, January 13th, 1911, at 12 o'clock M.

WASHINGTON, D. C., Friday, January 13, 1911.
12 o'clock m.

The Court met pursuant to adjournment.

THE COURT: Gentlemen, you may proceed with the case.

Argument of John G. Milburn, on Behalf of the Appellants (Continued).

MR. MILBURN. May it please the Court, I finished last night the presentation of the facts upon which it has to be determined whether the Standard Oil Company of New Jersey is an illegal combination in restraint of interstate trade within the meaning of the first section of the Sherman Act. I now proceed merely to mention with s'ight comments (as that is all my time will allow) various matters which are alleged in the bill as illegal means of monopolizing pursued by the Standard, the principal of which is the control and use of the Standard's pipe-line system. The allegations in the bill (which are quoted in the brief) in that regard are very specific, and I have no hesitation in saying that not one of them has been established.

To begin with, the pipe-line systems fall into two classes—the private and public. The private pipe lines are those of the Prairie Oil and Gas Company, in the mid-continent field; of the Ohio Oil Company in the Illinois field, and of the Standard Company of California in California. These lines are purely private lines. They are not common carriers, and the companies are not quasi-public companies. They are private corporations; they buy and deal in oil, and have built their pipe lines for their own purposes. They never carry oil for anybody else, and have never held themselves out as ready to do so, and are under no legal obligation to do so.

The same is true of the private lines across the States of New Jersey and Maryland, which were built for the Standard refineries in New Jersey and at Baltimore. It is charged that those lines, which originally belonged to the National and New York Transit companies, were, in view of the Hepburn Act of 1906, which brought pipe lines under its jurisdiction, conveyed to the Standard Oil Company of New Jersey, to evade the Act. There is no foundation for that statement. These lines across the State of New Jersey, from the New York line on the north and the Pennsylvania line on the south, and across Maryland from the Pennsylvania line to Baltimore, were built on private property exclusively for the use of the Standard's own refineries, without any franchises obtained or

being required. The National Transit Company and the New York Transit Company, which built them for the supply of those refineries have no franchises and no corporate right to operate franchises in the States of New Jersey and Maryland. They have no franchise to carry on any public business in those States.

In some rearrangement of pipe lines in 1905, or at the end of 1905, one of the things that was done (as the pipe lines across the States of New Jersey and Maryland were built exclusively for the refineries at Bayonne and Baltimore) was to convey them to the Standard of New Jersey which owned the refineries. That was done in November, 1905. The Hepburn Act was not introduced until January, 1906, and it was not until April, 1906, that the first amendment was moved with respect to bringing pipe-lines within the Act. The conveyance was a perfectly proper transaction and was not undertaken to evade any law.

There is some criticism of another transaction, which it is said in the Government's brief was done under my advice. That is right and true; and I said it was done under my advice to relieve counsel from further examination of witnesses as to how it came to be done. As the State lines between New Jersey and Maryland and New York and Pennsylvania were the termini of the public pipe-lines in New York and Pennsylvania, terminals were provided at those points consisting of storage tanks, so that as the Standard of New Jersey takes its oil at those termini and pumps it into its own pipes running to its refineries, any refiner or shipper could do the same thing by providing a pipe line connection in New Jersey or Maryland with the terminal storage tanks, or otherwise taking it from the tanks. The provision of the storage tanks was a proper step whether it was necessary or not under the circumstances.

A great part of the Standard's pipe-line system belongs to the four companies that I have mentioned. It is purely private; has never been used by anybody else; has never been held out as being available to anybody else. The Hepburn Act, as I construe it, does not pretend to make them common carriers, and could not have done so if that had been its intention. I am not going to argue the question, but I deny the right of Congress to make a private business a public business.

MR. JUSTICE HOLMES: Let me understand that. Do yon say that these pipe-lines that you refer to were built on private property, without any exercise of the right of eminent domain?

MR. MILBURN: Without any exercise of the right of eminent domain.

MR. JUSTICE HOLMES: And they have never held themselves out as carrying for anybody except their own people?

MR. MILBURN: Never. The one qualification is in the case of the Prairie Oil and Gas Company, which, by private arrangement, laid its pipe on a railroad bed part of its distance. It made an arrangement with the railroad company, but bought the rest of its right of way. It bought the property and built the pipe line, and has never carried a gallon of oil for anybody but itself. It has never carried any oil but its own, and has never held itself out as a common carrier.

The public pipe-lines are in the States of New York, Pennsylvania, Ohio, Indiana, and West Virginia. In those states through the right of eminent domain being necessary and the organization of the companies under public pipe-line Acts, the lines are public pipe-lines. The pipe-line systems in those States consist of two parts. There are first the gathering lines. When a well is opened a pipe is laid to it. The oil flows into the pipes from the wells, and is carried to central storage places in the district where there are railroad and trunk pipe-line connections. Anybody can put his oil into the gathering pipes for a gathering charge of 20 cents per barrel. Upon the payment of the gathering charge a man can keep his oil in the pipe-line for thirty days without further charge. After that he can keep it in the storage tanks for twenty-five cents a thousand barrels per day. If a producer runs a thousand barrels from the Pennsylvania field into the pipes, worth thirteen or fourteen or fifteen or sixteen hundred dollars, he pays the gathering charge, and nothing more for thirty days; and after that, for twenty-five cents a day, he can store it indefinitely and sell when he pleases. I mention that point because refiners who buy the crude oil must have it, whilst the producer may temporarily store and not sell, and it is that relation which governs the price of the crude oil. When it is said that anyone can make the price of crude oil any price he pleases—the Standard Oil Company or anybody else—it is a monstrous absurdity, because the refiners must have the oil

and the producer is not bound to sell. No producer has testified on this trial that anybody has the power of fixing the price at which they shall sell, or ever has had that power, or that any injustice has ever been done to any miner or producer of oil by reason of the price paid. From the gathering systems in Pennsylvania into which anybody can run his oil there are trunk pipe-line connections with the seaboard at Philadelphia, with Cleveland and Buffalo and various places in the oil regions through which the oil can be transported to those refining points if desired.

But the vital point is this. No human being has ever asked to have oil transported by the Standard's trunk lines. Every refining interest has its own pipe line association. That is how the business has grown and developed. No concern goes into the refining business on a considerable scale without having its own pipe-line system or being associated with a pipe-line system as a part owner, as is the case with the Pure Oil, the Tide-Water, the Gulf and the Texas Refining Companies and others. They all have their pipe-line systems. The fact is that a pipe-line system is a necessary adjunct of a refinery.

Technically the public lines are common carriers; but nobody uses them. They run full, night and day, for the supply of the Standard's refineries for which they were built; but if anybody tendered oil for transportation, they would take it. Under the Hepburn Act of 1906 the public lines had to file tariffs, and tariffs were filed, and rules and regulations. They have been in force for four years. Grave complaints are made in this case about the rates, rules and regulations. But nobody has applied for relief to the Interstate Commerce Commission, which has full and complete jurisdiction. Nobody has laid a complaint before the Commission. Nobody has invoked that tribunal to correct any wrong in the tariffs, regulations or anything else. Then why should it be argued here that we have excluded people, that we have discriminated against people, that we have refused to provide terminals for them, when there is not a syllable of testimony to that effect, and when the fact is that no human being has ever asked to use the trunk lines; nobody has ever asked us to provide additional terminals; nobody has made any complaint of any kind, although there has been a tribunal for four years to

which they could have gone with full power to correct any wrong or injustice. No human being has gone before that tribunal, notwithstanding the publicity which this case has given to the Government's charges in regard to the utilization of the pipe-lines for the purposes of monopoly.

I say that the pipe-line system is simply an adjunct to the refineries, and it has excluded nobody from the business.

Another charge is in regard to the control of the refined prices. It is said that we have unnecessarily raised prices and manipulated prices over wide areas to suppress competition.

MR. JUSTICE HOLMES: When you said a few minutes ago that it was absurd to talk about the Standard controlling prices, you meant the purchase price of the crude oil?

MR. MILBURN: Yes.

MR. JUSTICE HOLMES: At first I did not quite understand that.

MR. MILBURN: That is what I referred to. Its price is the price that it will pay for crude oil. There are a great many other buyers, the independents having a large volume of business, and the producers need not sell by reason of the cheapness of the storage. They can hold their oil for better prices; but the refineries must have it. That is my point. Pennsylvania oil is not now in storage. All of it that is produced is used. Whilst many years ago there was Pennsylvania oil in storage it has practically all been used. For a long time there has been a limited supply and a constant demand, and that is why Pennsylvania oil, apart from its quality, commands its high price. When an extra gush comes and there is more oil the price goes down.

Regarding the prices of refined oil—the manufactured products—we present the Government's figures showing the rise in prices of commodities generally for twenty years, from 1890 to 1910; and annexed to our brief is a chart graphically illustrating the rise in prices during that period of commodities generally. That is the Government's classification, and it comprises some 245 commodities. Another chart shows the rise in prices and the fall in prices of refined oil. It is a graphic illustration of the whole situation. It shows that refined oil has followed the general flow of prices. There is another chart of a selected number of the principal commodities, and it shows that the

general course of oil prices was below that of those commodities. There is another chart showing the relation of the crude to the refined, and how the refined has followed the crude in its prices. No one can look at those charts (which simply picture the facts and are not theoretical) without being convinced that there has been no arbitrary dealing with oil prices, and without seeing that they have been the result of economic causes and the operation of natural laws, and not of the fiat of the Standard Oil Company or anybody else.

It is argued that the Standard has economized so in its manufacturing processes that, though labor and commodities used in the processes have increased in cost, its manufacturing cost has not increased ; that the Standard has met those increases in costs by the constant application of economies, and that therefore the price of oil should not have risen. But that position entirely ignores the fact that because of the rise of prices of commodities generally, $690 purchased in 1895 what $1,000 purchased in 1906. That fact is demonstrated by the Government's chart and figures.

THE CHIEF JUSTICE : In 1906 ?

MR. MILBURN : When we were trying the case. That is when our figures were made. We had to stop at that period. We were trying it in 1907 and 1908.

THE CHIEF JUSTICE : You meant in 1895 ?

MR. MILBURN : 1895.

THE CHIEF JUSTICE : I thought you said 1905.

MR. MILBURN : No ; 1895 and 1906.

THE CHIEF JUSTICE : Pardon me. All right.

MR. MILBURN : If a manufacturer's cost of production does not increase, still the price of his product must go up with the prices of general commodities, so that his net revenues may continue to have equal purchasing power. His price had to go up, because $1,000 of net revenue in 1906 was only equal in purchasing power to $690 in 1895. No man, because his costs have not increased by reason of economies, can keep his prices stationary. With the net revenue that he gets he can only buy in the ratio that I have mentioned, and therefore all commodities have to follow a general course, so that net revenues will bear the same relation to the purchasing power of money from time to time. That would seem to be a very obvious proposition.

They give an instance of the Standard's alleged control of prices when, for sinister purposes, as they allege, to injure certain refiners, it in 1893 to 1895 raised the price of the crude and depressed the price of the export oil, so that there was practically no margin of profit, and as those refiners had to depend a great deal upon exporting their oil they were thereby deprived of their profit. The course of the crude and export prices during the period indicated is charged to the Standard Oil Company like everything else that has happened in the oil trade, as if it were a force of nature. They do not look anywhere else for the explanation of events. They do not look into the facts; there is the Standard Oil Company and it is damned for everything. It is praised for nothing and damned for everything that has happened.

On the Government's figures the Standard is the great buyer of crude oil—fifty or sixty milllion barrels a year, a great amount anyway. Just think! If to hurt somebody with a total business of about one million dollars a year (that being the gross business at that time of the refiners who originate this charge) the Standard arbitrarily put up the price of crude thirty cents a barrel, it meant a loss to it of $6,000,000; and if it depressed the price of the product it sold for export (because the export price of oil is the price at which the Standard sells oil in New York for export, and it amounts to a great deal—dealers buy it in New York and ship it to their foreign customers) another great loss would ensue. It would appear if anybody sat down with a pencil and figured the matter out, that (assuming that the Standard manipulated the prices as is claimed to injure a few refiners) it could only have done so at a cost or loss to itself of anywhere from twenty to forty millions of dollars. But let us look at the economic causes to see if they do not furnish an adequate explanation of what happened. They are set forth in the record. They are admitted by the witnesses, but they would not connect them with the result. The stocks of crude oil during those years were running down in Pennsylvania—the Pennsylvania stocks—and the price of crude always goes up at such times. The figures in the record show that condition. In the same years during the panic of 1893 and the times that followed, with the decreased demand in this country, the decreased consumption,

the export business was pushed and materially increased. The falling off of the domestic demand forced the Standard and other refiners to send more and more refined oil abroad for a market, thereby necessarily reducing the price of export oil. Those are the economic reasons for the prices of crude and export oil in 1893, 1894 and 1895.

The Government charges that the Standard has cut prices and lowered them in competitive areas and made high prices and high margins of profit in non-competitive. The price exhibits are in evidence, and the arguments both ways are in the briefs. I cannot stop to explain the exhibits. I assert from a careful study of them that they demonstrate that the prices of the Standard, generally speaking, are normal all over. Of course they vary. Throughout our opponents' brief they are always contrasting the prices and margins of profit in various regions with the prices and margins of profit in the Rocky Mountain States where the communities are small and widely scattered, unstable and not permanent, and where it is the uniform experience that prices and profits are higher. Volume of business as a determining factor is entirely disregarded. It is not worth while carrying on business unless you get a net return adequate in amount, and that may compel a greater rate of profit. And when they criticise our prices and margins of profit in any region as indicating an effort to suppress competition they always take the high margins of profit in the Rocky Mountain States as the basis of comparison. Of course they are much higher there for the obvious reasons I have given. But I must pass that subject.

Now, as to our profits. They have much to say in regard to our profits. They assume that the decision of this Court in the Consolidated Gas case that six per cent. is a fair return applies to a great business of this kind. They take our capital of $70,000,000 in 1882 and say that all of the increases since that time have been made out of surplus earnings, and should not therefore be taken into account in computing the percentage of profit; that the capital assets should be disregarded; and although the capital assets have now a value of over $359,000,000, they figure out our profits on a basis of $70,000,000, and make them very great. They take, for instance, a particular company like the Standard of Indiana,

with capital assets of twenty-five or thirty millions of dollars, but only a nominal capital of $1,000,000, and computing its profits with reference to its nominal capital say it has made one thousand and one per cent. It did make one thousand and one per cent. on $1,000,000 but such a statement is absolutely meaningless. If we take all the profits of this business (the figures are in the record) down to 1897 or 1898, they averaged fourteen per cent. per annum of the capital assets of the business, the tangible assets only, and not including the good-will and other intangible assets of these going concerns ; and since 1900 twenty-five per cent. of the capital assets—the tangible assets. The figures for the years 1898 and 1899 are not in the record, but there is no reason to assume that they would vary these percentages.

I undertake to say that if we had assembled in this room the most prominent business men in the United States, they would agree, if asked what should be the net revenues from a great business of this kind to provide liberal dividends, to provide funds for construction, development and expansion to meet the demands of expanding trade and new oil fields from time to time, they would say twenty-five per cent. of the capital assets. I have no doubt of that. The increase of profits in the later years is due to the increase of by-products, calling everything by-products that is not illuminating oil, which all yield a larger profit than illuminating oil—the product of popular consumption. The increase in by-products in 1906 over 1895, was 112 per cent. In 1895 61 per cent. of the Standard's product was refined oil, and 39 per cent. by-products. In 1906 refined oil had gone down to 47 per cent. and by-products had gone up to 53 per cent. Of the 47 per cent. that was illuminating oil 63 per cent. was exported and sold throughout the world, and 37 per cent. in the United States. As an indication of the growth and prosperity of its competitors we have only to refer to the Government's brief where it is said that in 1879 the Standard had from 90 to 95 per cent. of the business, whilst in 1904 it consumed 79.3 per cent. of the crude oil refined in the United States and produced 80 per cent. of the refined oil and 77.1 per cent. of the naphtha, which are the products of the greatest magnitude.† The truth

†NOTE.—See Government's Brief, Vol. I, p. 145.

is that as the independent refiners have given up scolding at the Standard and emulated its enterprise and energy and won confidence, their trade has been increasing and every percentage of the Standard has been going down and down; and so it will continne in the natural course of things.

I will read, as expressing the independent situation better than I can (and it is done by no friendly hand—the Commissioner of Corporations)—the following from one of his reports:

> "Many independent concerns have gone a good way in the direction of integration. Thus many of the small refiners of Western Pennsylvania and Ohio are interested in crude-oil production, and supply part of the oil which they refine. A considerable number of them have small pipe lines or are part owners of pipe lines for supplying their refineries with crude. A large proportion of them have facilities for selling their products directly to retail dealers or are interested in marketing concerns which have such facilities. The great majority of the refiners, it is true, have not carried integration nearly so far as the Standard. But some of them, such as the Pure Oil Co., the Gulf Refining Co. (in conjunction with the J. M. Guffey Petroleum Co., which is owned by the same interests), the National Refining Co. of Cleveland, and the Union Oil Co. of California, have developed the system of integration to a degree approaching that of the Standard itself. All of these concerns have pipe lines, refineries and local marketing facilities. All of them carry the elaboration of by-products to substantially the most complete point permitted by the character of the crude which they use. All except the National Refining Co. are large producers of crude oil. All of them own tank cars and all, except the National Refining Co., own tank vessels. Probably none of these concerns manufactures the accessory materials of refining, packages, etc., to any such extent as the Standard does, but otherwise their system of integration is nearly as complete as that of the Standard. The difference between them and the Standard is rather in the volume of business than in its comprehensiveness." †

† Report of Commissioner of Corporations on the Oil Industry of August 5th, 1907, at pages 636, 637.

Thus it appears that as the independents have put themselves in shape to do business efficiently and economically they are doing more and more of it, from year to year as they could have done in the past if they had been alert, courageous and enterprising.

I cannot touch upon the question of undue competition or railroad discrimination, much as I would like to do so. I cannot take any more time.

MR. JUSTICE DAY: Let me ask you whether these briefs and this volume A contain all of the record that the Court will need in order to inform itself about the case?

MR. MILBURN: The facts are given in our brief, in Volume 2.

MR. JUSTICE DAY: We have here some twenty-three volumes.

MR. MILBURN: Yes.

MR. JUSTICE DAY: But do we need anything more than has been furnished to us?

MR. MILBURN: I do not think so, except that you will have to refer—

MR. JUSTICE DAY: By reference, of course.

MR. MILBURN (continuing): To particular parts of the record. There is an effort in our brief to bring to your attention every material fact, with references to the testimony, and to present them fairly. The Government has done that also. From my point of view, I prefer the notes to the Government's brief, with their references to the record, to the brief itself, which is very ample, and which gathers up all the hearsay and all the suspicions and all the rumors of forty years and presents them as the facts in the case with considerable literary power.

MR. JUSTICE MCKENNA: You submit your case on the brief and the argument?

MR. MILBURN: I submit our case on the facts set forth in our brief.

THE CHIEF JUSTICE: On the facts referred to there.

MR. MILBURN: Yes; on the facts referred to and the references to the record.

MR. JUSTICE DAY: You do not present the facts with any less force than do the Government?

MR. MILBURN: We are modest. The facts are particularly

complex. Everything is embodied in the record that has occurred during the forty years of the life of this concern. That it has done some things in strenuous times (and there have been strenuous times) which it should not have done I am not here to dispute. That is human, and the men who manage corporations are just as human as the men who manage their individual affairs. Forty years of continuous history is a long expanse; but there it is, and whatever there may be that from a moral standpoint seems to suggest criticism, there is nothing that goes to the root of the matter when both sides of the question are concerned. We have to depend as to all such matters on the careful attention that I know the Court will give to this record. I have presented the subject imperfectly, there is so much of it. There are still many features of the case I would like to discuss, but I have not the time. The great issue is the common ownership, and the division of the single token of that ownership with its definite value into thirty-seven tokens, the value of each of which will be a matter of future experience. I need not say how momentous a matter that is to the owners of the stock of the Standard of New Jersey, the market value of which is over $600,000,000 and whose dividends are $40,000,000 a year. No one can say what the market value of the substituted shares of the thirty-seven corporations will be if many of them can find a market at all. Should stockholdings of such immense total value be revolutionized merely to convert an equitable ownership of the thirty-seven corporations into a legal ownership? Is not that the net result of the decree because it does not seek to disturb the common ownership beyond that? It is a momentous issue, and one can only be thankful that it is, for final solution, before a Court which follows the star of reason, and does not hear the voice of passion or prejudice.

AFTER RECESS.

Argument of DAVID T. WATSON, Esq., on behalf of the Standard Oil Company, of New Jersey, et al.

MR. WATSON: With the permission of your Honors, it is my duty to try to argue to your Honors two questions in this case; and I am allotted one hour to do this.

THE CHIEF JUSTICE: You have two hours and seven minutes left on your side.

MR. WATSON: Yes; but for myself, I mean.

MR. JOHNSON: Take the hour and seven minutes yourself.

MR. WATSON: Each of these questions involves very considerable detail, and if fully discussed would require the citation of authorities, and the discussion of them, and the citation of evidence. That, it is apparent, it is impossible for me to do within that time. Therefore, if my argument seems to be rather sketchy, rather a drawing, as vivid as I can make it in chalk, of the outlines and the prominent features which I think should determine these two questions, you will understand why it is.

Before I go specifically to these questions, while perhaps after all this discussion it is not necessary, I do desire to impress upon this Court this fact, which stands pre-eminent in this case: You never have had a case like this before you under the Sherman Act. Every case that you have decided was decided on grounds and under facts which are dissimilar, notably dissimilar, from the case at bar. And I take up, just for a moment, a rapid sketch of how this Standard Oil plant arose. Now let me tell you:

Oil was discovered in Western Pennsylvania in 1859, in small quantities at first; but in 1865 it increased to a production of 2,500,000 barrels. Then it was that John D. Rockefeller and William Rockefeller and several other men entered into the oil business. This oil, if your Honors please, was at first produced in a small section of Pennsylvania. The wells were what were called gushing wells—"gushers." The business grew after a while to a production of three and four thousand barrels of oil per day; with the result that producers

not having the facilities to take care of it, not having the facilities to refine it, at least one-half of that oil, for weeks at a time, was wasted and lost.

As I have said, the field of production started in Western Pennsylvania. Slowly, but very slowly, it traveled into New York. Then, as the years passed, as what was called "wild-catting" went ahead, oil was discovered in Ohio, in Indiana, in Oklahoma, in California, in Texas, and in very many of the States of this Union. The production of oil jumped in rapid figures from 2,500,000 barrels in 1865 to 126,000,000 barrels in 1906. Notice that, if your Honors please—it grew to fifty times the production of 1865 in 1906. Notice, too, the figures by which this quantity was rapidly approached. It jumped up to 26, to 30, to 40, to 50 and to 60 millions. This, too, was in the case of a product which, when it started, many men thought would suddenly cease; a mining production, the location of which no man knew. Millions, literally millions of dollars were thrown away in what are called "wild-cat" wells. And when you talk about the great earnings of oil, let me take your Honors to Western Pennsylvania or any deserted field, and you will find as much money, within a small proportion of the oil territory, sunk in unproductive wells as you will find made out of the oil that had been produced from the ground.

It was necessary in the first place for people who intended to make this a life work to carefully consider and lay out their ground, and see what was to be done. The very first thing that was required was the protection of the production. The next thing was its transportation to the refineries. The third was the economy of the refining, and the improvement of the quality of the oil. And the next was the transportation of the refined oil and the by-products from the different refineries to the different places for sale.

As the production increased, as it grew and jumped from State to State, these men who had entered into this business,—our friends say, simply as conspirators to evade the law—these men who made this business their life work, who put into it every dollar they owned, and risked the fortunes of themselves and their families in this business and in the extension of it—this Court is asked to believe that these men

got up a conspiracy in 1870 by which all they sought was a maleficent effect upon the trade in the oil business.

Why, look at it—look at it, if the Court please!

First they built a refinery at Cleveland. How did they get their oil there? They paid $2 a barrel for taking their oil there. Look at the amount of that. Next, all along through the oil regions there was refinery after refinery erected, temporary structures for the refining of oil. In Cleveland there was erected a first-class plant by these men, producing first-class oil, making it for less, selling it for less on the market, and, of course, taking the trade. Then, as the production went West, look how they followed it! I have a map here that I will hand to your Honors, with your permission, hereafter, by which you can trace the whole development of this plant, and follow it in connected links (not disconnected units, not things standing alone and built for that purpose, but in connected units), running from Oklahoma until it reaches the Atlantic Ocean near New York.

Not only that: The oil that is developed in Oklahoma connects, through these pipe-lines, with every one of the eighteen refineries. No one of these refineries was erected except to supply the necessities of the immediate location. All these were built by whom? By one group. There never was a division. They were built by one group, by one great partnership. They started first individually. Then they organized as partners. Then they organized as a corporation. Then they organized as a trust in 1879. Then, in 1882, it went into the formal trust; and then, in 1899, it was conveyed to the Standard Oil Company of New Jersey. But it was always one connected whole—always. It was always owned by one group of owners. There never was a diversity of ownership. There never was competition between these people. You could not imagine that partners themselves would compete among themselves, or that the owners of stock in a corporation that held fifteen or twenty refineries would compete among themselves by means of these different refineries which they owned.

So, if your Honors please, when you come down to to-day and look upon this case, remember that you have got what you never had before: You have a connected, unified plant; you have

a plant that was necessary for the economic production and refining and transportation of this oil. Not a single link in that whole chain of buildings, of physical structures, is tainted. It may be that some men have used these machineries to make oil, which oil they put into interstate commerce, in an improper way. But that did not taint the refineries or the pipe-lines or the reservoirs or the tank-cars. All men and women, irrespective of their attitude toward the Standard Oil Company, must admit that here is a plant unequaled in the world—unequaled in the world for the purposes for which it was built. It is an honest plant. It is built without regard to money. The refineries are the best. The pipes in the pipe-lines are the best. The reservoirs are the best. They are located in the most advantageous positions. And taking it all together, if your Honors will search this country far and wide, here is an unequaled plant. Here is a plant capable of infinite good. Why should it be destroyed? It is capable of infinite good. And it is the disintegration, practically the destruction, of this unified plant, in which to-day is invested probably $400,000,000—it is this disintegration, this destruction of this unified plant against which I formally and pronouncedly protest, and come immediately to the discussion of the questions which are committed to me.

If your Honors please, there is in reference to these trust cases one rule to which I may refer. I must find the issue, as my friends must on the other side, in the pleadings. There must be something averred and something denied, and the point raised. Now, what was it that was averred in this case, and what was the issue that was raised?

Why, the averments were that in 1870 John D. Rockefeller, William Rockefeller, and one or two others, combined and conspired to associate themselves together for the purpose of restricting trade and monopolizing the oil business. It was not any divergence into any other trade. These men built this plant. It is only fit for the production and the refining and transportation of oil. And the charge made in this petition was—just let me read you a line of it: I read from page 6 of Record A:

"That the defendants, John D. Rockefeller, William Rockefeller and Henry M. Flagler, in or about the year 1870, and at all times since that time, together with the other individual

defendants herein, who thereafter from time to time, between said time and 1882, joined said conspiracy, to wit, Henry H. Rogers, John D. Archbold, Oliver H. Payne, and Charles M. Pratt, entered into and have ever since been engaged in a conspiracy with each other, and with other persons, corporations, co-partnerships and limited partnerships"—

To do this thing that I tell you. And then, if your Honors please, here follow some three hundred pages of the averment of all kinds of things—rebates, illegal contracts, taking unfair advantage of competitors, etc. We denied this averment; and the issue then, of course, was: 'Is this true? Was there a combination made in 1870, and was it continued through?' And the question seemed to be simple enough.

Twenty thousand pages of testimony were taken on that issue, and your Honors have that record before you. When the court below came to consider it all, what did it say? There is not a single page of it that is relevant to the issue that we have before us. It turned its back on it all; and while it held that the Standard Oil Company of New Jersey had violated the Sherman Act, it said that the reason it had violated it was not because of a conspiracy in 1870, carried down through all these years; not because of these things that our friends have reiterated and colored and tried to make prominent to your Honors—not that. The court below said that the combination that was formed was since 1890; not in 1870. They said it was since 1890, since the twenty years in which our friends locate these alleged illegal acts—since 1890. And then that the conspiracy consisted in what? Anything fraudulent? Any deceit? Not at all; not at all. It consisted in the joint owners of this joint plant conveying it to the Standard Oil Company of New Jersey and taking stock for the same.

There is the length and breadth of their offending. That is this fraudulent organization that stops only at the prison bars. When we had a trial in the court below, the only thing they condemned us for was that—You in 1899, then a lawful body of men, holding a lawful property, built with your own means, owned by you all as a single group, under control of trustees—you men in 1899 conveyed this property to the Standard Oil Company of New Jersey and you took stock for it; and that is a violation of the Sherman Act. That in itself

is a restriction of trade. That in itself is a monopoly, seeking by illegal means to exclude other traders from this oil business.

Not only that, if your Honors please: What did this petition pray for when it was presented? Why, let me show you.

The petition prayed that the court below would do what? Would dissect, would cut into thirty-eight pieces, this one plant? Not at all—not at all. What it prayed was that the court would enjoin every one of the defendants, and each and every one of them, from doing any act in pursuance of or for the purpose of carrying out this conspiracy. Your Honor will find that in Record A, page 111.

What did the court do? Why, the court made a decree practically confiscating this property, this plant—practically destroying it. I say "practically": I do not mean to say, of course, that it destroyed one hundred per cent. But it did in great degree destroy this plant. It cut it into thirty-eight sections, and it bound hand and foot the men who as a single group owned each one of these separate plants, as I will hereafter describe to you, until it made it practically impossible (I use that expression advisedly) for the owners of this group under this decree, to successfully operate any of these plants.

But, if the Court please, there was not only that in the case; they not only restricted them in that way, but they did this as to each one of these thirty-eight plants. Each one of them is owned by exactly the same three thousand men. Each plant has to stand alone. It is the oil business, you know; and we have got to produce oil somehow. We have got to get it from the wells up into our refineries and our reservoirs. We have got to refine the oil. We have got to find some way to transport it from the refinery. If we want to export it, we must use ships. We are thirty-eight groups, each of the same three thousand men.

MR. JUSTICE MCKENNA: You say "thirty-eight" because there were thirty-eight corporations?

MR. WATSON: Yes, sir; thirty-eight corporations, by means of which we hold all these different properties. The Court segregates these thirty-eight groups and in effect the Court says: If you make a contract, express or implied, whether in

reference to the price, to the transportation, to the purchase or to the sale of oil, you violate this injunction. And that is the decree that was made under this prayer to restrain these people from continuing those illegal acts.

If the Court please, what is the first question to which I now come ?

That question is, the opinion in which the Court gave its reasons for the decision against these defendants. And I shall take up the findings in the first section of the decree, to wit :

In Section 1 it was decreed that this sale to the New Jersey corporation was a violation of the Sherman Act, and constituted the offense of which we were convicted. And just let me urge this, because I never think of it without being impressed with the peculiar situation we are in : What is the thing that we did that was illegal ? And I press that on your Honors now. There is not a single sentence of the Court below finding fraud. There is not a single sentence of the Court finding intent. There is not a single thing said about our desire to exclude others from the trade, or that, illegally, we ever did exclude them from the trade—not a single sentence. And yet the Court held that this conveyance to the Standard Oil Company of New Jersey was a crime under both sections of the Sherman Act. And, if so, these people who participated in it became criminals, liable to be punished for making that conveyance. That is true.

If your Honors please, look at it with me now for a moment, because I do not think any one admires the Circuit Court of the Eighth Circuit more than I do. The learning and ability of those gentlemen is beyond dispute. And yet for the life of me I cannot understand this decision.

I could have understood it if the Court had found as a fact that this conspiracy had existed ; that it was carried out by unlawful means ; that it was using unlawful means to eject others from the trade. I could understand, of course, that by going under a corporation we did not shield ourselves from those unlawful things. We could no more commit wrong under a corporation than we could under a partnership or a trust. And that is what your Honors really decided in the Northern Securities case.

But the Court did not find that. It said : Apart from all these charges, not connected with them, not influenced by

them, the very thing that you did (this conveyance to the Standard Oil Company of New Jersey)—you, the lawful owners of a lawful plant, operating it under the law, amenable to the law, the owners of it, the men who built it as one whole, who made it a unique and a perfected plant—this thing done by you men, simply because you resolved to take advantage of the laws of New Jersey and convey this plant to them, is a violation of the Sherman Act; it is a restraint of trade; it is an attempt to monopolize trade.

Why, if the Court please, we did not gain one power under the corporation that we did not have under the trust. There were no new managers put into the field. There was no new property anywhere. There were no new paths that we trod. It was the same identical people. We did not associate other people with us. It was the same joint ownership. We did not put in alien property. It was the same joint property that we owned. Pray tell me how a conveyance to the Standard Oil Company of New Jersey, under the circumstances, could restrain, could monopolize the oil business by unlawful exclusion?

Was it unlawful to convey to the Standard Oil Company of New Jersey, except under a decision like this? Was not the question of the right a question of the law of New Jersey? Is it true that the Federal courts sit in the avenues of interstate trade to question the methods in which the citizens of the different States carry on their business? Is it true that the Federal courts sit to investigate the question of the title and the combinations of the titles of the physical structures in the State, merely because, perchance, I may use a refinery to make oil, which oil I take and introduce into interstate trade?

I trow not. And yet this conveyance *per se* and in itself, and not anything else, is the great crime of which we have been convicted, and for which this sentence is made.

Why did the Court do that? The court said because they were bound to; they had to follow this Court; and they said that is what your Honors decided in the Northern Securities case.

I knew something of that case in its origin in St. Louis. Let me see if I cannot, in three different ways at least, and without any difficulty, make the broad dividing line, so that the man who looks and wants to get the truth

never can doubt that the one case bears no relation to the other.

What was the Northern Securities case? Here were two parallel and competing railroads, with their connections, running from Chicago to the Pacific Ocean. They were parallel and competing. Morgan and Hill and some others got up two groups of stockholders for the purpose of merging those roads. The case finally came into this Court, and is known as the Pearsall case. And your Honors gave them warning then, and said in so doing that it was perhaps not the direct issue in the case before you—but you gave them warning then that if they attempted to and did merge and consolidate those roads, it was a conspiracy in restraint of trade and a monopolization of the trade, and it was illegal.

Morgan and Hill at once abandoned it. Then the question was, "Is there any legal way by which this can be done?" And some learned gentleman in the East (I have never heard who it was; since the decision of this Court I never could find the man who did it, or who would admit that he did it) advised that if Morgan and Hill and these other people created a corporation under the laws of the State of New Jersey, it would have the power to buy the capital stock of each of these companies; that thereby they could, under the law of New Jersey, merge and consolidate; and the effect would be that the New Jersey corporation (and of course the stockholders in it) gained a power to do what? Why, to do what your Honors said in Pearsall's case could not be done—combine and merge these two parallel and competing roads.

Do not your Honors see that they were after a legal power to merge and consolidate these roads, and they thought they had it in the New Jersey corporation? And, if your Honors will remember, the battle in part there was over the question of the passing of the title, and the power of this Court in reference to interstate commerce. But you all agreed, as of course you would, that no matter what the attempt was, no matter under what form or guise or disguise, no person could evade the Sherman Act, and that this attempt under the laws of New Jersey to do that was of course futile.

Have you any such case as that here? Did we seek to gain any new power under the Standard Oil Company of New Jersey. Not a bit. After we had conveyed to the Standard

Oil Company of New Jersey we had exactly what we had before, except that before we held a trustee's certificate; afterwards we held stock of the Standard Oil Company. But we had identically the interest, of the identical value, under the control of the identical persons, that it was before. We did not get a power; we did not seek a power; we did not restrict competition. There was no competition to restrict. The group that conveyed was a jointly-owning group that did not compete.

Is there any similarity between these two cases?

Again: there were two groups that owned these two railroads. They both sold to the Northern Securities Company; and then the stockholders in each got an interest in the stock of both companies. You see, there was a merger of the two roads. A stockholder in the Northern Securities Company, who was formerly a stockholder of the Northern Pacific, now got an interest in both the Northern Pacific and the Great Northern. Is there any such thing as that in our case? There they gained new property. There they gained a new power. There they advanced on the road to monopoly and the restraint of trade.

My friend, Mr. Kellogg, (and of course he is unintentionally mistaken) says that there was only one group of stockholders that owned the Northern Pacific and the Great Northern; that they were not competing at all. I do not know why they conveyed to the Northern Securities Company if that is true, because if they had merged before I do not see why they wanted to go in under cover of that. But he says there was only one group. Why, if your Honors please, what do we find when we turn to the bill in that case? I have said to your Honors that I had something to do with that case originally, and I thought I knew at least that much about it—as to what it was the Government charged.

I find that the bill says:

"That at the time mentioned"—

That is, at the time of this conveyance to the Northern Securities Company—

"These two railway systems were then engaged in active competition with one another" (193 U. S., 203).

It was not a merged, consolidated group. There were two

independent roads actually engaged in competition with each other. That is the charge in the Northern Securities bill.

It is said that there was an inside group. As I understood Mr. Kellogg, he said that Mr. Hill and some distinguished gentleman from Canada had an inside group of stockholders in both properties. But if your Honors will turn to the testimony of Mr. Hill, which I have before me, you will find that Mr. Hill says that that is not so. He says some of his friends and himself held, together, from seventeen and a half to twenty millions of the Northern Pacific. (Printed record of No. Sec. Case, Vol. I., pages 47, 48; 52, 53.) What was the capital stock of the Northern Pacific? One hundred and fifty-five millions. My friend said that the preferred stock could not vote there. He is mistaken. The preferred stock could and did vote, although the common had the right to and did, in the end, retire the preferred. So that when the Court below said that they were bound by the decision of this Court in the Northern Securities case to decide as they did, with great submission to their learning and ability I do think that they made a plain mistake.

But what else did the Court say? And I want to emphasize this, because I do not want to argue this case on some question that I think is perfectly clear on the facts as the Court below found them, and then be told that I have not discussed other facts. I am presenting the question as it was presented by the court. I am discussing the reasons the Court gave for the decision. And I am attempting to persuade your Honors that that conclusion is wrong.

What else did the court below say? Why was it that this simple change of ownership from a partnership to a corporate form—that simple change and nothing else—was the offense?

In the Joint Traffic case, when pressed with an argument to the effect that if the Act was literally enforced all kinds of combinations would be restraints of trades, and society would be disintegrated, each man as a warrior to protect himself, your Honors said that it never had been suggested, within your knowledge, that the organization under a corporate form was a violation of any law, that that was a combination in restraint of trade, or that that was a monopoly. That was a lawful means which has

produced untold good, and I agree in large degree has produced wrong. But it was a lawful means organized for the purpose of developing trade, that enabled the poor man of whom we hear so much, to take an interest in the joint enterprise without the danger of being ruined by a failure. And yet it was the conveyance to this lawful means, it was the conveyance to this lawful corporation, by people who had a right to convey, that was our offense.

But the Court said : You are able to look after the details of your affairs better by this conveyance. You are able to agree more easily as to profits. You are able to agree more readily as to prices and one or two other things ; and these are the abhorrent things that prevent you from coming together, under this Corporation.

But is that true ? Under our trusteeship, under our joint ownership, could we not easily agree upon prices ? What is a trustee ? He is an agent appointed to represent me in my business, and the scope of his power depends upon my consent. What is a trust ? It is a conveyance, known for hundreds of years, whereby one man puts his real estate or his personal property in the charge of his agent to manage and care for. Did we not, under the trust organization, have every bit of power that we had under the corporate organization ?

MR. JUSTICE HARLAN : Whom do you mean by " we " ?

MR. WATSON : I mean the Standard Oil group, sir.

MR. JUSTICE HARLAN : That group of thirty odd corporations ?

MR. WATSON : Yes, sir.

MR. JUSTICE HARLAN : Let me ask you this question just there : Suppose we call one of those corporations A, and one B, and one C, for illustration. They were each managing separate properties ; were they ?

MR. WATSON : Yes, sir.

MR. JUSTICE HARLAN : Separate oil ?

MR. WATSON : I do not want to mislead your Honors. You ask " separate oil ? " Do you mean separate ownership ?

MR. JUSTICE HARLAN : No, no ; I mean separate plants.

MR. WATSON : Your Honor used the word " oil," and I did not understand you.

MR. JUSTICE HARLAN: They were managing separate plants?

MR. WATSON: Yes.

MR. JUSTICE HARLAN: In different parts of the country?

MR. WATSON: Yes.

MR. JUSTICE HARLAN: Did the ownership of stock in Corporation C entitle these stockholders, *per se*, to an interest in the stock of Corporation A?

MR. WATSON: Through the trust?

MR. JUSTICE HARLAN: Through the trust.

MR. WATSON: Yes, sir; through the trust.

MR. JUSTICE HARLAN: Without the trust they would have been entirely separate?

MR. WATSON: Oh, yes, sir. But they are all owned by the same persons, sir, if you could say "separate" under those circumstances.

MR. JUSTICE HARLAN: Do you mean that the stockholders in Corporation C were exactly the same stockholders as those in Corporation B?

MR. WATSON: Just exactly. There was not a divergence of interest.

MR. JUSTICE HARLAN: Running different plants?

MR. WATSON: Running different plants.

MR. JUSTICE HARLAN: In different parts of the country.

MR. WATSON: In different parts of the country—all owned by the same people. There was no separation of ownership at all. There was no separation of the persons.

THE CHIEF JUSTICE: I was under the impression that the judgment of the lower court proceeded upon the assumption that the combination of these owners in the trust was subject to the same infirmity as would be their combination in this corporation.

MR. WATSON: It expressly said, sir, that it would not consider or determine the question of legality, but did say that they were subject not to the same infirmity, but to the same control. Perhaps I did not understand your Honor's question.

THE CHIEF JUSTICE: Did not the Court below proceed upon the theory that the aggregation of the owners of all these corporations in a trust was subject to the same infirmity that the aggregation of all these owners in the Standard Oil Company of New Jersey was?

MR. WATSON: Oh, no, sir.

THE CHIEF JUSTICE: Then your argument, as I understand it, proceeds upon this theory: You start with the premise that the trust was legal; and, therefore, you say, the trust being legal, the Standard Oil Company was legal?

MR. WATSON: Yes, sir.

THE CHIEF JUSTICE: Are you not, therefore, begging the very question upon which the lower court put its decision?

MR. WATSON: Oh, no, sir! That is what I said to your Honor, and that is what I read from the decree, and that is what is undoubtedly in the case. The Court assumed the validity of that trust. I do not say it conceded it. I do not say it held it.

MR. JUSTICE MCKENNA: Do you mean to say that the Court has held that if the trust had been in the situation of the Standard Oil Company, it would not have dissolved the trust?

MR. WATSON: Oh, no, sir; it did not say so. But what I do say is this: The Court said that all that happened prior to the conveyance in 1899 to the Standard Oil Company of New Jersey was unimportant, and that they would not consider it. They said that the illegality was the conveyance to the Standard Oil Company of New Jersey. If I had time, sir, I could read you half a dozen extracts from the opinion along that line.

MR. JUSTICE MCKENNA: Was not that because at that time the law condemning this combination was not in existence?

MR. WATSON: Oh, no, sir; because, remember, the combination was carried on until 1899. It is so alleged, you know. Our trusteeship in part existed until 1899. It operated nine years after the Sherman Act was passed. Oh, no!

MR. JUSTICE MCKENNA: What page are you reading from?

MR. WATSON: I am looking now at page 17 of my brief—page 17 of my revised brief. You will find a number of citations there. Let me just make certain of that now, while I am at this point.

THE CHIEF JUSTICE: I did not want to interrupt you.

MR. WATSON: Oh, no, sir; I beg your Honor's pardon. I thank you for interrupting me, because I do not want to talk here for talk's sake.

THE CHIEF JUSTICE: I understand that.

MR. WATSON: I am trying to convince your Honors that I am right about this; and I am certain, if your Honors will pardon me for saying it directly, that when you read the opinion of the Court you will agree with me.

THE CHIEF JUSTICE: That is all I wanted to know. I would not stop to explain it, because your time is limited; and I certainly see your answer to it now.

MR. WATSON: Yes, sir.

THE CHIEF JUSTICE: And I must investigate it. I just wanted to understand your position.

MR. WATSON: I must rely, of course, upon my brief for ever so many things here.

THE CHIEF JUSTICE: Yes; pardon me.

MR. WATSON: You know I have only fifteen minutes more.

THE CHIEF JUSTICE: Yes. I am sorry you have not an hour.

MR. WATSON: Your Honor is very kind indeed,

Now let me ask another thing: What did the Court say were the illegal things that we were doing after this conveyance was made in 1899, and down to 1906? Did they find that we were taking rebates? Not at all. Did they find any fraud or deceit, or that we were holding ourselves out as fictitious companies and deceiving the public? Not at all. Is there anything in the four corners of that opinion which designates any act by these people between 1899 and 1906 as fraudulent and unlawful? Not at all. What were the illegal things that we were doing? Why, let me read to your Honors the things that the Court said were illegal things that we were doing in 1906:

"The power to vote the stock,"—now, remember, these are the illegal things in the Standard Oil Company—"to elect the officers of the subsidiary corporations, to control and operate them and thereby to restrict their competition in interstate and international commerce was illegally granted"—

And I call your Honor's attention to this, because it is a direct answer to your question—

"Was illegally granted to the Standard Oil Company of New Jersey in 1899, and that company ever since has exercised unlawfully and is still so using that authority, the seven individual defendants are dominating and directing its exercise of this power, the subsidiary corporations are knowingly

submitting to and assisting that exercise and all of them are participating in the fruits of it. These"—

Not fraud; not rebates; not unlawful exclusion of other people—

"These are menacing and continuing violations of the Act which the Congress has imposed the duty upon the courts to restrain and prevent" (Record A, page 583).

The illegal power granted in 1899 is continued by these votes for the directors, and that is the menacing thing—not unlawful acts; not going out and seizing some small trader in South Africa and defrauding him out of his business; not any of those things that my friend here has spent some three hours in discussing. It is these menacing things—the methods of exercising of the power that the Standard Oil Company of New Jersey has by reason of the conveyance of the property to it.

Let me come now to the second question, and that is the decree.

I say this decree is practically a confiscation; and there is nothing in the Sherman Act which authorizes a confiscation except under Section 7, where, if the property is caught in transit, the court may confiscate or forfeit it. But that is the only instance in the Act where confiscation is allowed.

Look at what this Court did. First, it enjoined the Standard Oil Company from voting the stocks in all these other companies. Suppose, if the Court please, just to illustrate the matter, I had wanted to go into the oil business in 1865, and that as the business developed I wanted to follow it. That would be perfectly natural—to want to follow it. Suppose I wanted to create a large business, and I took in my friend, the Attorney General—who was a better business man than I was: As we went on, he might think that the thing was a little risky, and say: "Well, now, Watson, as we go along, we will incorporate under the laws of each of the States. That is the easier way to hold real estate; it is the easier way to manage it, and it is the easier way to manage our affairs." So suppose we incorporated under the laws of a dozen different States: Would that have been a restriction of competition? Would that have been a monopolizing of trade? And yet that is what these people did—that is all. They obeyed the laws of the different States.

In the first place, under this decree the Standard Oil Company cannot vote any of the stocks of these companies that it holds for 5,000 stockholders. It cannot receive any dividends. It cannot in any way interfere with the management of these subsidiary companies. Now, remember, in the end it is the same people who own the subsidiary companies that own the Standard Oil Company of New Jersey. So there is a restriction against the group here, calling themselves the Standard Oil Company of New Jersey, and against that same group over there, calling themselves the Standard Oil Company of Indiana, that they shall not interfere with each other; they shall not exercise any influence on the other group in the other State. Of course, if the Standard Oil cannot get any dividends, if it cannot get any money to declare a dividend, its stock at once becomes practically worthless. And here you have, in the Standard Oil Company of New Jersey, 1,600 stockholders whose holdings amount to from one to five shares; and that stock, held by them as an investment, as a thing they can borrow money on, or sell, or receive dividends on, is depreciated until it is practically worthless.

Then the Court said: But you may disintegrate. You may convey to each one of the stockholders of the Standard Oil Company his share in the thirty-seven sub-companies, giving him his proportionate interest in each.

It results in this: Any man that owns less than five shares of the stock of the Standard Oil Company gets a fractional interest in the stock of these thirty-seven different companies—a fractional interest only. He cannot vote it, because a quarter of a share of stock cannot be voted. There is no way of transferring it. Nobody wants to buy it. And under the decree here, as I will show you in a moment, he cannot unite it with something else. And therefore he is ruined so far as his stock is concerned.

The sixth section of the decree begins:

"That the defendants named in Section 2 of this decree"—

That is, the thirty-eight companies, including the Standard Oil Company of New Jersey—

"Their officers, directors, agents, servants and employees, are enjoined and prohibited"—

Let me ask your Honors to follow, now, the great skill

with which this decree is drawn. In the first place, it enjoins all of them from continuing the combination adjudged illegal thereby. If your Honors are looking for that decree, you will find it on page 528 of Record A. They are enjoined, in the first place,—

"From continuing or carrying into further effect the combination adjudged illegal hereby."

Second:

"From entering into or performing any like combination or conspiracy the effect of which is, or will be, to restrain commerce in petroleum or its products among the States, or in the Territories, or with foreign nations."

That goes outside the combination charged. Not only shall you not continue your present combination, but you shall not make any other combination.

And, third, you are forbidden—

"To prolong the unlawful monopoly of such commerce obtained and possessed by defendants as before stated."

Let me ask your Honors in all sincerity to read with me the latter part of that decree, and to answer this question: Would any intelligent man who had a respect for his own person, and did not want to run the danger of inhabiting a prison, attempt to operate any of these plants under these conditions?

You must not do these things, either—

"(1) By the use of liquidating certificates, or other written evidences, of a stock interest in two or more potentially competitive parties to the illegal combination."

Here are these men that only have five shares of stock. If the Court would allow the defendants, in a distribution like that, they might make up and give to these small stockholders a share representing an interest in several subsidiary companies. But the Court says: "You shall not do it. You shall not put two companies in one certificate."

"(2) By causing the conveyance of the physical property and business of any of said parties to a potentially competitive party to this combination."

Here are thirty-eight companies. Here are eighteen refineries. What does "potentially competitive" mean? I suppose it means "power to compete." The refineries do not compete, though. These structures do not compete. It is the

men who use them. And now you have a restriction here that one hundred men owning this plant and one hundred men owning that plant cannot consolidate those plants and all of them own both together.

Take the question of potential competition: Why, that is a rule which your Honor, one of the dissenting justices in the Northern Securities case said, would cut society into fragments, and make warriors, instead of traders and peaceful citizens, of men. Competition is not a duty; it is a privilege. I am not bound to compete with my neighbor. If I am in a partnership of ten persons, and we own ten stores in the same town, does any person suppose that each one of those ten stores has to compete against each one of the others? Yet here it is; it is the "potential competition" that is referred to.

Why, see how that would restrict liberty! See how that would restrict trade! Look at it! Is it true that the man who starts in life, for instance, to produce and refine oil, who intends to make that his life work, cannot buy this site over here on which he can put an additional plant as his business progresses? Is it true that he cannot add to it, if he has the money, a dozen other sites that, if used by some other person, might be competitive? Is not that his liberty?

The Sherman Act does not say: 'You shall not have or buy more than one plant or one store.' It does not forbid magnitude. It does not forbid the ordinary, proper growth of trade and business. It fosters it. It was passed to foster it. It was passed to allow the fullest liberty in trade to every citizen in this country. And do you tell me that there should be a subtle construction of this penal law, that you should find that citizens of the United States commit a constructive crime, because, forsooth, they hold three different stores, two of which, if two other people had owned them, might compete? Or, if they had one refinery, because they bought another refinery, the product of which might compete? Is it not true, sir, that it is often the illustration of the effect of a doctrine that demonstrates its unsoundness much more than any technical reasoning could?

Then the Court says, further on:

"By causing the conveyance of the property and business of two or more of the potentially competitive parties to this combination to any party thereto."

There, again, it is said: "You shall not sell any one of these plants to any other person. You shall not even agree among yourselves." Here we are, one hundred men. We have got, we will say, fifty plants. We come along and say: "Well, Tom, Dick, Harry and John will take four of these plants, composed of a combination of pipe-lines and wells and reservoirs." The Court says: "You cannot do that; you shall not do it under this decree."

Then the decree goes on—and I confess I do not understand this:

"By placing the control of any of said corporations in a trustee, or group of trustees."

Why may not the owners of these properties put them in the hands of a trustee? Here we have a refinery. Why may not I, if I have the Attorney General with me, convey that to a trustee, and let the trustee hold and manage it? This Court says: "You shall not do it. It is a violation of the Sherman Act."

Then the decree says:

"By causing its stock or property to be held by others than its equitable owners."

Why? What difference does it make under the Sherman Anti-Trust Law whether I hold my stock by the legal title or by the equitable title? How is that a violation of the Sherman Act?

Those are positive prohibitions. We are told, "You shall not do those different things, because the Court has determined in advance that those things will produce a deleterious effect." And then, in addition, the decree says as follows:

"Or by making any express or implied agreement or arrangement together, or one with another, like that adjudged illegal hereby."

Here are eighteen refineries and pipe-lines, etc. You have got to have some connection between them. You have got to have a connection with a pipe-line if you want to get your oil from the producing wells, and you have got to have some connection with the transportation lines. And yet you shall not make any express agreement with them, and, lo and behold! You shall not make any implied one.

Think of transacting business with a number of other

people, in danger of being put in jail if what you have done some court should hold, some day, was an implied agreement!

We are also told that we shall not do this—

"Relative to the control or management of any of said corporations, or the price or terms of purchase, or of sale, or the rates of transportation of petroleum or its products in interstate or international commerce, or relative to the quantities thereof purchased, sold, transported or manufactured by any of said corporations which will have a like effect in restraint of commerce," etc.

Think of that! I ask your Honors again, with all sincerity: Would any man desiring to protect himself from ignominy by being put in jail, attempt to operate any of these plants under that decree? Have not your Honors said—did you not say in the Swift case—that you were bound to point out with particularity the things which the people are forbidden to do and the things which they are allowed to do? Did you not say you were bound to do that? Did you not say in that case that all the rules in reference to relief in equity forbade you from issuing a blanket injunction to cover indefinitely the future business of an organization? And yet this injunction has absolutely no limitation as to time. It not only seeks to control the uses, but it seeks to regulate the acquisition and the title and the holding and the methods of these State citizens, organized under the State laws, and never touching interstate trade until they put into the avenues of trade the products that were made from some of these physical structures!

Now, in five minutes, will not your Honors allow me to say (and I had a good deal more to say on that point) first, this:

The Court below said: This case is ruled by the Northern Securities case. We are bound to decide it according to that. The cases are parallel. The rule that governs one must govern the other—If so, why did they not make the decree that which this Court approved in the Northern Securities case? That was simply a decree putting the persons in the places where they were prior to the time of the conveyance. Why did they not do that, if the cases are similar? But let me call your Honors' attention more specifically to the fact that the Court disregarded the decree in the Swift case. Did

not your Honors decide, in the Swift case, first, that a combination was legal under the Sherman Act provided it did not restrict trade, or did not exclude others from the trade? And did you not review the decree of the Circuit Court in that case, and say that the broad expressions "any other method or device, the purpose and effect of which is to restrain commerce as aforesaid," were improper in that decree, and strike them out? Did you not say in that case that the only thing you could do there, sitting as a court of equity, was not to punish by confiscation for some alleged wrong that had happened twenty years ago—that was not the power given you as a court of equity—but to restrain the specific things which were being done when the petition was filed; that your power was to restrain and prevent, and it was the only power that was given to you? And then, more than that, did you not in that decree put right on the face of the decree: "But nothing herein contained shall be construed as an attempt to interfere with the lawful conduct of the business of these different plants"?

You said that, and you said more: "Provided, further, that we restrict you only as to certain things that are illegal"—the fixing of the price, the allotments, etc. "But you as a combination may proceed in the future, and you may operate this business, provided you do not do these illegal things from which you are now enjoined."

You did not strike down the combination. You have not done it in a single case. You did compel the disintegration in the Northern Securities case because they were two avenues of interstate commerce, and the law forbade them to be together. Here are private traders. The law allows them to be together, and does not forbid it.

THE CHIEF JUSTICE: I am sorry, Mr. Watson, that your time has expired.

Concluding Argument of JOHN G. JOHNSON, Esq., on Behalf of the Appellants.

MR. JOHNSON: It must have occurred to the Court, during the course of Mr. Kellogg's long argument, that there is very little help to be gathered by it, in dealing with the situation which exists in 1910, from telling a big roll of alleged sins of thirty or forty years ago. And it is rather a significant fact that in order to give the proper color and raise the proper amount of indignation, it is necessary for him to go back thirty or forty years, rather than to hunt at the present time for sins committed by this corporation.

I have neither the time nor the ability to follow him in his labored dissertation upon all the ills that have been attempted and accomplished by this Company. Certainly I have not the time to follow him in his allegation of illegal rebates taken since the year 1899. I refer the Court to the very elaborate discussion of that matter upon our briefs, with the assertion of the belief that after reading those briefs upon that subject you will be satisfied that there was no foundation whatever for his assertion.

As to the alleged cutting of prices: I think you will find, I think the brief demonstrates, that unless the alleged cutting is of a time up to or beyond which the memory of man does not go, that it was the result (certainly our testimony presents that fact) of an attempt to meet the cutting of rates by others. And undoubtedly, whatever might be the rule in some other forum, in the forum of business the presenting of the second cheek to be smitten after the smiting of the first cheek does not prevail.

In order, however, that the Court may have some little illustration of the manner in which in an oral argument things may be said for which a close consideration of the testimony will show no warrant, I will refer to a few of the very palpable errors which have been made in the way of accusation—most of them, as I say, in the distant past.

Mr. Kellogg said this in the course of his argument (I quote):

> "In 1870, 1871, 1872, and 1875, when the independent men in this country were shipping their goods to

Europe and building up a foreign trade, in those days they were sending from $36,000,000 to $57,000,000 of products to Europe; and it has never since exceeded $93,000,000."

That was a rather startling presentation of an alleged fact—that the independents alone in 1871 had sent to Europe from $36,000,000 to $57,000,000 of these oil products, and that at the present time the independents and the Standard together are sending only $93,000,000. The fact is that in 1871 there were exported in all 2,643,000 (I ignore the odd numbers) barrels of illuminating oil, at $12.67 per barrel. In 1906 the Standard alone exported 15,159,000 barrels—or six times the amount exported in 1871—at an average price of $3 per barrel. In 1875 the total value of the exports was $31,000,000, and not $57,000,000; and these exports were not by the independents alone, but were largely Standard oil.

Moreover, in the early days of the trade, to which he was referring, there was practically no production of crude oil in Europe; and therefore it depended altogether upon America for its supply; but in 1901 to 1905 the product of crude oil outside of the United States averaged 97,000,000 barrels.

So much for that.

There was an attempt to put a little color into the case by enumerating a large number of companies owned by the Standard (the number stated being 114), without allusion to the fact that forty-nine of these are corporations organized altogether in foreign countries and not parties to the bill; sixteen are American corporations that are not parties to the bill; and twelve are defendants as to which the bill was dismissed.

Then there was rather a taking statement made with regard to some cutting and competition in Los Angeles. But the truth about that matter was that there there was a company, or some companies, manufacturing asphalt from petroleum, and a by-product of that manufacture was oil. Of course, as it was a by-product, they could afford to sell it very cheaply. The question then was whether the Standard Oil Company should permit them to take away the whole trade, or whether they should meet the low prices which they made by equally low prices. And they met them.

Another statement was made—one of those incautious

statements that counsel in the secrecy of their own chambers (I will not say at night) perhaps regret making—to the effect that the producers, as Mr. Kellogg stated, store oil in the Standard's tanks "at storing charges which, the record shows, would eat them up in a year."

The storage charges for 1,000 barrels are 25 cents a day, or $91.25 a year. One thousand barrels of Pennsylvania crude, at $1.58 per barrel (the average price for five years, 1903–7) were worth $1,580. In other words, the storage charge amounted to six per cent. Would that the years that would be exhausted in that way might be the years that might be allotted to us for the balance of our lives, and that a year might spin out to that length?

Then there was a statement made with reference to a man named Harrison, engaged in South African trade; and the treatment that we are said to have accorded him seemed almost Zulu-like in its barbarity. But in the hurry of an oral argument Mr. Kellogg forgot to add the explanation that the Standard were shipping under contracts which gave full ship-loads, and stipulated for a very large amount of shipment per month; whilst Harrison was making what were comparatively spasmodic, or certainly very small, shipments irregularly. There was not the slightest connection in the evidence between the Oil Company and the fixing of those charges by the carrier companies. The shipping men were having whole ship-loads sent by the Standard, and of course the rates were lower.

Then there was a statement made to the effect that in the proceedings before the Hepburn Committee in 1879 there was a concealment of relations between the Standard Oil Company, Charles Pratt & Company and others. At that very hearing, where that concealment is seriously alleged to have been made, there was given this † testimony, by Mr. H. H. Rogers, one of the Standard people:

> "Q. What are the refiners that are now in association with the Standard Oil?
>
> "A. The people that are now working in harmony with us comprise about, I should think, 90 or 95 per cent. of the refiners.

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† See Government Brief, Vol. I., p. 41.

"Q. Now, tell us their names, the leading ones?

"A. Some of the leading ones? The Standard Oil Company, Charles Pratt & Co., the Sone & Fleming Manufacturing Company; Warden, Frew & Co., of Philadelphia; the Standard Oil Company, of Pittsburg; the Acme Oil Refining Company, of Titusville; the Imperial Refining Company, of Oil City; the Baltimore United Oil Company, of Baltimore."

What is the use of talking of concealment, when there in the record from which the charge of concealment comes is the fullest disclosure at the time of the full extent, with the statement "comprising 90 or 95 per cent"?

The advantage of discussion in court—above all when the bench sometimes participates in the discussion with the bar—is that it is a great thrashing-machine which winnows the chaff and leaves the kernel of the issue. And there is very little left, after the discussion in this case, but the consideration of some very elementary principles, and the presentation of some very elementary thoughts.

I will put what I have to say under these propositions:

First. It is the duty of the Government to define the meaning of the words "combination in restraint of trade" and "monopolizing", and that where they have attempted to perform that duty, their definitions are unwarranted, vague and indefinite.

The next proposition is that acquisition, in the course of conducting a business, of competitors, is not a combination in restraint of trade, however large; and that monopolizing is the acquiring by means of illegally excluding others from their rights.

The next proposition is that the combination which existed in 1899 was in all respects a legal one.

The next proposition is that there was nothing whatever violative either of the prohibition against restraint of trade or that against monopolizing in what was done in 1899, in transferring those corporations and properties to the Standard Oil Company of New Jersey.

The next proposition is that there were no acts of illegality or abuse shown since 1899; and that if there were, the result

would not be the confiscation of the property, but the punishment in the way prescribed by that Act.

And the last proposition is that this case is ruled by the Knight case.

Let us take up now the first proposition, with regard to the duty of the Government to define.

It will not do to say, as was said by the learned Assistant Attorney General in one of these discussions: "It is not the business of the Government to define 'monopolizing.' Let these parties go ahead and do their acts, and after that it will be determined what was done, and a definition will be given of the word 'monopolizing'."

It is the duty of every legislature who enacts a criminal statute to so write it—not so high that neither eyes nor mind can see, but to write it so plainly—that every man may know whether he offends. For instance, I know what three feet are; but I cannot tell whether three feet constitute a yard unless I know how many feet are in a yard. In the same way, I cannot be indicted for monopolizing, and I cannot be convicted of monopolizing, unless the statute which prohibits defines with sufficient clearness what "monopolizing" is.

That thought is akin to what was stated by a very prominent and distinguished member of the Lower House when the Act was passed, when he was asked to say what the Statute meant, and utterly ignored as a part of legislative duty the giving of any definition to it, saying, "That is for the judicial department; it is for the court to find out." But the person who is to be punished must know in advance whether he is committing the offense

Several definitions have been given by the Government, and I now propose to consider them. They are definitions that have been given orally, and definitions that have been given in printed briefs. Those in the printed briefs differ not so much from the oral definitions, except that they are more ornate, and contain more flowers of speech. But perhaps that is attributable to the fact that the atmosphere of this court-room in oral argument is rather chilly for the cultivation of that kind of flower.

Now let us take up some of the definitions that have been given by the Government. And I take in the first place the

definition which was given by Mr. Kellogg in his original oral argument in the Standard case:

"Every corporation and every combination under Section 1, having the power to suppress competition and control prices or output, whether it be the intent or a condition of it, tends to a monopoly, that is, if it tends to that degree of power so as to enable them to be a controlling factor in commerce, is void."

The gist of that definition is that every corporation which has the power to suppress competition and control prices or output may do it.

The next definition is:——

THE CHIEF JUSTICE: Pardon me, Mr. Johnson. You say, "may do it?"

MR. JOHNSON: That is what he says. He says that every combination which has the power to suppress competition and control prices or output is a combination that is illegal under the first section of the Sherman Act.

THE CHIEF JUSTICE: Then you mean to say that he says that every corporation that has that power violates the law?

MR. JOHNSON: Yes; whether they do it or not. I am going just to refer to that rather anomalous idea of criminal law a little later.

THE CHIEF JUSTICE: Pardon me.

MR. JOHNSON: Then the next definition I refer to is in one of the briefs in this case, on page 52; and it reads thus:

> "We do not maintain that every sort of restraint of interstate or foreign commerce is denounced by the Sherman Act, and certainly no such doctrine is essential to the relief asked. But when, as in the present case, the restraint is a direct consequence of, or that to which the challenged contract, combination or conspiracy necessarily tends, and also of a material or substantial character, it is clearly within the meaning of the statute."

There is the plainest possible statement that the Government does not maintain that every sort of restraint of interstate trade is contrary to the Act; and it must be of a material and substantial character. But why did Congress insert that word "every"? In order to get a definition that was

never intended by the legislature, they are obliged to state the definition and withdraw some of the incidents that would go with it. But this Court has said that you could not insert before the words "restraint of trade" the word "reasonable." How, then, can we deal with a definition which gives such a meaning to this as requires the person who defines, to state that he disclaims that which the Act of Congress expressly says—that *every* restraint of trade shall accomplish that fact?

The next definition is this:

"The law says"—

I think this is a new statute that has been written in a Government office. I have never read it in any of the printed volumes of Congressional enactments.

"The law says that parties shall not, by contract or combination in the form of trust or otherwise, remove the incentive to compete, leaving it to the natural laws of trade to create and foster competition."

The next definition is thus: It was made in the oral argument by the learned Attorney General; and it gets very close to what our definition is—so close that we almost come together:

> "I have never contended, and the Government does not contend here, that the mere ownership of all of an existing commodity, where the avenue is open to anybody else to go in and purchase the same commodity, and the possessor does not interfere in the slightest degree with the exercise of that right by that other person, consists in, and of itself is, an illegal monopoly. That is the position I have always taken, and it is the position I conceive to be the sound one, and it is the position taken by those very eminent lawyers in drafting this proposed bill."

The present Chief Justice asked whether the argument addressed itself to the fact that enormous wealth enabled it to do injury, and that the monopoly was the result of its enormous wealth? The Attorney General replied: "No; not necessarily."

Bear in mind, now, what is contained in that definition: "The mere ownership of all of the commodity is not monop-

oly," says the Attorney General, "within the meaning of the Act, unless the possessor interferes with the exercise of their rights by other persons."

Now let us come to still another definition, which you will find in the new brief by the Attorney General on page 39:

"It is not necessary in this case"—

He forgets some of the kind intentions with which he construed the Act before, and he hardens the lines upon us:

> "It is not necessary in this case, and we doubt whether, in any case, it is possible, to make a comprehensive definition of monopoly which will cover every case that may arise."

That is the heresy which was announced orally.

> "It is sufficient if the case at bar clearly comes within the provisions of this Act."

But how can you know whether it comes within the provisions of the Act unless you have clearly defined in your mind what it is that the Act punishes, and what "monopolizing" means?

I quote further from the same passage:

> "We believe that the defendants have acquired a monopoly by means of the combination of the principal manufacturing concerns through a holding company; that they have, by reason of the very size of the combination, been able to maintain this monopoly through unfair methods of competition, discriminatory freight-rates, and the other means set forth in the proofs. If the Act did not mean this kind of monopoly", etc.

I am now going to consider that all these abuses are within the idea of exclusion; and even in that definition we have to interlard, with the statement of the monopoly, the use of the discriminatory methods and the exercise of the abuses.

Then there is another definition, which was given in another brief, on page 99 of it; and that definition reads thus:—or, rather, I will read the definition that is given in

the present oral argument. The learned Attorney-General says :

> " Senator Hoar defines ' monopolizing ' as the sole engrossing to a man's self by means which prevent other men from engaging in fair competition."

That is a clear-cut exclusion, because it is an engrossing by means of exclusion. The Attorney-General defines " engrossing " to be " appropriating trade and merchandise to a particular person or persons or body politic, to the exclusion of others ; " and he says that " to-day monopoly is engrossing with the added protection of a State charter." " Engrossing " he defines as the exclusion of others ; and " monopoly " contains an engrossing that carries with it that exclusion.

Another definition in their brief is :

> " Monopoly is the outcome of the practical cessation of business competition. * * * Trade and commerce in any commodity are monopolized whenever, as the result of the concentration of competing businesses—not occurring as an incident to the orderly growth and development of one of them—one or a few corporations (or persons) acting in concert practically acquire power to control prices."

Now let us see where we stand upon that definition.

They are dealing, now, with a combination not only big, but one that contains everything, and excludes all others. But they say that that combination is not in restraint of trade if it is the result of orderly growth. But we have a statute which punishes every combination in restraint of trade, which does not exclude the combination which restrains trade because its power to do it is the result of orderly growth. And must we not cry a challenge upon that method of defining which again puts upon the statute a definition that its language does not warrant, and escapes from its consequences by putting an exception in a statute which permits none?

But they now say that the acquisition of competing plants is not necessarily an offense; that is necessarily permitted (notwithstanding the decision in another case by a learned

circuit court), because otherwise you would stop every transaction. Therefore we have a concession, first, that the acquisition of competitors is not a violation of the Act; secondly, we have a definition, which is that the mere bigness of a combination is not in violation of the Act, unless there is an affix or a suffix; unless, from one point of view, it is so big that it excludes others by its bigness; or, from another point of view of the Government, unless it is so big and excludes others by interfering with their just rights.

If the result of natural and orderly growth in the case of a combination so big as to exclude all others is not a violation of the Act, what is orderly growth? In this case there were some acquisitions; but the property as it exists today is a property that was built up and reconstructed. It is impossible to find any of the original elements. It is a property the enormous proportion of which results from its growth in the effort to do a trade as large as the demands of this country and of foreign countries should require. Is not that orderly growth?

The acquisitions by purchase from others are but the drops in the bucket. The real extent and strength and power and wealth of this corporation today results from its own creations, and the accretions resulting from its own exertions.

I ask again, What is orderly growth? There are several competitors, all of them engaged in the fierce competition which I understand the law says shall have no limit. In that competition all of them go to the wall but one; and that man is left in full possession of the trade. Is he a criminal? Because as the result of that competition which he is told by the courts it is his duty to indulge in, he is the acquisitor of all the trade, is he a criminal? When does he become so? At what stage of the competition? Is he a criminal whether he buys out the people who, going to the wall, make the best of what is left, or whether he does not buy them out, and their property goes to ruin?

Or there is a large corporation, say like this, which they say dominates trade; and the independent competitors (and there was a peculiar answer given to a question by one of the learned Justices addressed to this matter) band together for the purpose of beating the larger competitor; and as the result

of their brains, skill, and exertions, the larger competitor is beaten, and they are left in possession of the field: Are they, at the moment of their victory, instead of realizing the results of their exertions, to be punished as criminals for the accomplishment of that which they are told to do? Is that orderly growth? If it is, the learned Attorney General says it is not punishable under this Act.

Or, a man by his knowledge of secret processes of trade, and his skill, succeeds in obtaining the whole trade: Is that orderly growth? And yet he is in possession of the whole trade; and as a result of that possession, under one theory, others are excluded from it.

And if bigness, a certain amount of bigness, is not punishable, and a certain large amount of bigness is punishable, how big is it to be? What fraction? Why did not the legislature, in language much plainer than they have used, define this matter of bigness? And where do we come to the sustaining of this decree upon the Government's interpretation of the Act? That interpretation is: "You may buy out competitors; you may acquire, by orderly growth, all, but you may buy out competitors; you may have a very great degree of bigness; but you must not be so big as to exclude others." Take it on either horn of the dilemma.

Then what is the justification of this decree? If, then, this corporation is too big, it sins only to the extent that it is big beyond the percentage which enables it to exclude. You cannot dismember it. You cannot cut it all in pieces. You cannot deal with it as has been done in this case. You must define up to what point it does not violate the Act, it is not big enough to violate the Act. And you leave it at any rate in possession of that bigness on their presentation of the definition.

But what has been done in this case? Pipe lines owned by two or three different companies, organized as different companies because the laws of the State perhaps compelled it, form one continuous pipe line. That continuous pipe line, the aggregation of fragments in the different States, has been built with the property of these people for the purpose of supplying refineries, to them belonging, with oil. This decree not only strips away from the refinery which requires it the use of a pipe line that has been constructed for it, but it cuts that

pipe line in pieces, and puts the strongest sort of a ban upon ever uniting the fragments of that pipe line. There is a company which owns the tank cars that have been used in this general business for the carrying on of all the business; and that company, so owning all those tank cars, is stripped away from the companies which have built the tank cars under that charter; and you separate them so that the tank cars, without any business to be done, are to be owned separately from the companies which give them the business.

So with the ships and steamers that have been built up under a corporation owned by these people; built up not for the purpose of transacting the foreign trade of one, but for the purpose of transacting the foreign trade of all. You strip them from the companies for whose use they were built, and you prevent them from ever again owning them in any way.

Under this idea (to reduce it to its elements), if a combination is too big, why not reduce it to a permitted size? If we have too many arms and too many legs, why cut them all off? Why add vivisection? It is too much like Chinese punishment.

Who says—what work upon political economy, what court, has ever said—that if you have so large a corporation as that simply by its largeness others may be excluded, that is to be condemned?

But let us not deal with theory; let us deal with the present case. On their theory that it is all right however big it is unless you exclude others from trade, where do they stand? Why, it is in evidence in this case that from 90 to 95 per cent. of the total, the production of this Company has gone down to 80 per cent. How significant is that! It is in evidence in this case, from the Bureau of Corporations, that there are growing up corporations engaged in this business which are most prosperous, and are transacting a very large business. How is it possible to say, if their definition be correct, that it is only punishable when it is so big as to exclude, in view of the fact that, instead of excluding others, more and more are coming into the trade and are succeeding? Away goes this idea of exclusion!

How on earth are you going to have an exclusion of others from the trade in the matter of manufacturing? Manufacturing requires brains and courage and capital and raw mate-

rial; and as long as those four are open, it is idle to talk of exclusion. Brains and courage are not the subject of legislative gifts. The man who possesses them is entitled to all the good he can get therefrom. Capital is not monopolized in this country, because, with the enormous wealth outside of this corporation, what is to prevent others from going into it, unless by abuses; which subject I will deal with later. And raw material: With but eleven per cent. in the control of this corporation, how are we excluding? Give them the worst definition for this corporation that can be given; let it be that the exclusion must simply be by being so big that there is no business left for the others: As a fact the business is left for the others; and as a demonstrable fact, you cannot monopolize that business, because none of the elements which are necessary for the transaction of that business can be monopolized.

Now we come to our definition, which is: That the acquisition, however great, in the course of business, is not a restraint upon trade; and that monopolizing goes farther than some of the definitions of the Government, and means an exclusion by illegal means.

MR. JUSTICE DAY: Mr. Johnson, just a moment: I do not undersand your "eleven per-cent."

MR. JOHNSON: Eleven per cent. of the crude oil is in the control of these people, and the rest of it is in the control of outside parties; that is, the raw material out of which all these products are made.

MR. KELLOGG: Do you mean the oil wells?

MR. JOHNSON: I mean the supply of crude oil; I do not know whether it is from wells or from above or below. It is the supply of the crude product.

THE CHIEF JUSTICE: That was stated over and over, in the argument of this case, is about those proportions, as I recall it.

MR. MILBURN: Yes; that is right.

THE CIHEF JUSTICE: As I say, in about those proportions, it has been stated over and over.

MR. JOHNSON: That is about right. I do not carry the fractions in my head.

Now, with regard to monopolizing: Have I answered your Honor Mr. Justice DAY's question? I meant to.

MR. JUSTICE DAY: Do you mean to say that eleven per cent. of the crude oil produced in the country is controlled by the Standard Company?

MR. JOHNSON: † Eleven per cent. of the production of crude oil alone is owned by us; the rest we buy.

THE CHIEF JUSTICE: Of course your opponents answer that by saying that that percentage is calculated upon the total product, and contemplates the product of oil which is not susceptible of being refined as well as the refinable oil.

MR. JOHNSON: I think you will find by reference to the figures that their statement is not correct.

In the first place, as I have said before, the mere chatter of the men who talk in Congress goes for nothing. But where a man like Senator Hoar, a distinguished lawyer, drew a bill, and so drew it that after all sorts of attempted amendment it was finally enacted in the words in which it was written, we do get some light upon the meaning of the bill from what he says. And he defines monopolizing as the exclusion of others by such acts as constituted engrossing in the old times. I have just read that definition.

These words "restraint of trade" are words that had been known to lawyers for several centuries. They had a very distinct meaning. "Combination in restraint of trade" were words that had a very distinct meaning. Who ever supposed that under that head you were to cover acquisitions? Bear in mind that the power to buy and sell is one of those things which alone makes a property right valuable. It is not necessary to argue that, because they have not done it. Congress may interfere with the right of buying and selling, but it has not done it in this case. And there is not a word here to indicate any legislative intent to restrict the power to buy or sell, or interfere with those transactions of life which consist of acquisition.

The fact that there is no remedy prescribed except indictment, injunction, and three-fold damages, shows that they

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† In 1906, the Standard's production of crude oil was about 11 per cent. of the total crude produced in the United States. The Government's Brief, Vol. I., p. 139, admits the above, but says that the Standard in 1906 produced 26 per cent. of the total Pennsylvania crude produced and 31 per cent. of the total Lima crude produced.

were not contemplating the doing of something which could not be dealt with by those remedies, and that what they did have in their minds was an offense which could be remedied by either of the three. And under our definition you can so remedy it.

Then, again: What was contemplated was some definite wrongdoing. It was the monopolizing or attempting to monopolize any part of the trade. Upon their definition of monopolizing, where do we stand? It has got to be the acquisition of so much of the trade as accomplishes certain results. But upon our definition, whether it interferes with all or whether it interferes with the smallest part; whether it interferes with a great corporation possessed of millions or a man possessed of but a dollar, if any part of the trade is attempted to be monopolized, that is the offense. And, therefore, I put it to you that their definition necessarily fails, because the thing that was clearly in the legislative mind was a thing which, in all its parts, without exception, was under the ban of the law, because it was an illegal act.

How much time have I remaining? The learned Attorney-General got over fifteen minutes beyond his time.

THE CHIEF JUSTICE: Go on, Mr. Johnson. Your time will have expired at about twenty minutes of two; but we will hear you at all events until the hour of adjournment, with great pleasure.

MR. JOHNSON: I am very much obliged to the Court.

My third proposition is that the ownership was legal at the time of the transfer in 1899.

Let us do away with the *cheval-de-frise* of what occurred in 1899. These properties were all owned by the same owners. Mr. Kellogg has put most erroneously what took place in the Northern Securities case. Mr. Harriman in that case owned the majority of the stock of the Northern Pacific Railroad, and did not own a share of stock in the Great Northern. In the fight for the possession, some of the owners of Great Northern acquired some of the shares of the Northern Pacific stock. But in this case we have a lot of owners owning together the whole of this property.

Was that illegal? The best answer to that question is that the Court has decreed that we shall resume our ownership. Therefore I need not waste your time by discussing the

contention that the ownership which existed at that time was a proper ownership, in view of the fact that we are compelled to resume it.

The reason for the holding of corporate shares was that one corporation, as the policies of the state then were, could not have sufficient capital to own the whole; and some of the States would not permit them to own a pipe-line or do such business excepting under a corporate charter. But what existed, though the corporate guise was used, so far as the Federal law was concerned, was this: It was precisely in the same position as if all those properties, as properties, were owned by us. The malediction that was put upon it was simply because it was *ultra vires* of a corporation to be controlled by other than its own shareholders. But that was not a Federal question. And therefore we had a corporation which did not get anything by virtue of a combination. It had the thing before the combination existed. We had a corporation which had conducted a business, enlarging it from time to time; and that corporation, owning that business, by different owners, was in a position to hold it; and if nothing had been done, it would not at the present time have come under this statute, according to the Government; and up to 1899 it conducted its business under it.

Now (for I must hurry), I come to the proposition that the transfer of that property at that time was not illegal.

Why was it? How was it a restraint of trade, with all the property owned by these people, for them to put the property so owned by them in a corporation in which they owned exactly the same number of shares? They owned in a corporation which owned all the property precisely what before they owned directly in the property. Was that a restraint of trade? Was that a monopolizing? Certainly it was not a restraint of trade or intended to be a restraint of trade; for we went on with the business unlimitedly, enlarging it as rapidly as we could. Certainly it was not a monopolizing, because the acquisitions after that time are too insignificant to be noted; and whatever we had, we had.

Suppose that several persons as a partnership had been conducting business, and the men were growing old—it is a thing which occurs every day in the experience of practicing lawyers—and, having built up a business which, unless it can

be conducted, will not yield to those who came after them a tithe of what it is worth, they form a corporation for the purpose of enabling that business to be transacted after their death: Would any one say for one moment that that was contemplated by the legislature under a criminal restraint of trade, or under a monopolizing? Can it possibly be that if a certain number of men own a property, and it becomes necessary for them in order to better utilize that property to put it in a corporation, there is anything criminal in that, or that there was ever any intent to punish that thing?

And now we come to the very heart of the Government's contention.

The learned Attorney General saw precisely where was the pinch of this case; and he said, as said the Court at St. Louis, that the wrong that was done was the destruction of potential competition.

Such destruction is only a wrong to the State if the State is entitled to the competition. Here were these people with a property which it was necessary for them to hold together in order that they might get out of it the best value. And because of that purpose and that purpose alone—not to monopolize, not to restrain; they had nothing to gain from that, but in order that the title might be vested in them—they did this thing, they committed an offense, because they deprived the Government at some future time of potential competition!

Suppose that those different owners, by their wills, valid under the law of the State, provided (because the learned Attorney General said they might die, and it would be scattered) that these shares should be held together as a unit in the hands of their estates: Would anybody pretend that they had violated the law in endeavoring to use their property to the best advantage?

Potential competition: I am entitled to put my property in the shape in which it will be most useful to myself; and I violate no law when I put it in that shape. The Government has no right to speculate upon a dismemberment or a destruction of the value of my property by my death. I have a right, and it violates no right of theirs. The argument comes to this: It is not wrong in the present; but simply because, while not monopolizing anything at present, at some future

time I may be so unfortunate as to want to sell and be obliged to sell my property, I shall have to sell it in a ruinous way. Is it likely that these people will sell their property so it will be disintegrated?

I cannot deal with the question of illegal acts. All I have to say under that head is that they are not proven, and that if there was illegality in the act, it did not confiscate my property. The Act prescribes the punishment; and amongst the punishments prescribed is not that of confiscation.

I come now to the proposition that the property is within the ruling of the Knight case.

Here we have pipe-lines altogether within the State, refineries within the State, marketing stations within the State, tank-cars located in a certain place; and that, we say, comes within the definition of the Knight case.

What is to prevent any man from going into a State and buying a refinery? What boots it to say that the result of his buying that refinery and dismantling it is that there will be no commerce in it? He has a right to say whether there shall be commerce or not. So in the case of wheat lands and corn lands, there will be no commerce because they are bought. But commerce is the next stage; and he is not obliged to furnish it.

The Knight case was decided fifteen years ago. It was decided with the concurrence of eight members of this Court. It has never been questioned by this Court in its rulings. The legislature, with fifteen years' knowledge of the interpretation put upon it by this Court, has never amended that Act. Enormous investments of property have been made upon the faith of that decision, and acts done which this Court is now asked to brand as criminal.

Nowadays we hear a great deal of what are called or stigmatized as "reactionary courts"—by which I understand the courts that go to the statutes as printed, and to the volumes of decisions by which the law is settled, and not to the files of newspapers or to the speeches of oratorical demagogues. For myself, the foundations of property, and with property society, will be better maintained by the time-honored rule of *stare decisis*.

In a moment of hysterical contemplation of the sins of others (for we are never so apt to exaggerate our own), we are

apt to mistake the extent of their wrongdoing and the remedy to be applied therefor. In the case of these large corporations, the need is not for their extirpation or their disintegrations. By their mere largeness the country does not suffer, but profits. Without these corporation prices will be higher; hundreds of thousands of men will be deprived of employment; and our foreign trade (more and more dependent upon our manufactures because of the alarming increase and growth of our population which consumes our agricultural products) will be destroyed. We shall have no chance in the competition of the world for trade with a rival like Germany, the most intelligent of them all, which by special legislation fosters the combination which you are asked to condemn as criminal.

Mr. Kellogg was unduly lacking in faith when he told you that the abuses which these corporations might perpetrate could not be prevented under the law; but he was somewhat inconsistent when he added, later, that the growth and prosperity of those that were now existing and growing up resulted from the checking of these abuses. He underestimated the potency of the power which this Court has conferred upon the Government in preliminary investigations of all their books and papers and transactions. He underestimated the potency of injunction, indictment and three-fold damages. Certainly he need not fear any over-fondness for these corporations by judges, and hardly need lose his sleep at night in apprehension of their receiving too much favor from juries.

Let the channels of commerce be open for all who may desire to enter, whether with ocean steamer or with dugout, with Rockefeller wealth or with naught but their brains and their hands, unfettered by their own improper restraints, and uninterfered with by the abuses of others, and all will have been done that is wise. Beyond that lies the antagonism of irresistible economic necessity, and danger of disaster the length and the breadth of which no man can foretell.